

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

Wednesday, April 24, 2019
11:05 a.m.

TRANSCRIPT OF CONFERENCE
BEFORE SPECIAL MASTER DAVID R. COHEN

APPEARANCES:

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(Appearances continued to Page 2.)

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Certified Realtime Reporter
United States District Court
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Cleveland, Ohio 44113
216-357-7092

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produced by computer-aided transcription.

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1 MORNING SESSION, WEDNESDAY, APRIL 24, 2019 11:05 A.M.

2 THE COURT: Okay. Everybody, thank you for
3 being here. Here is the plan. I received Tuesday
4 mid-morning an agenda which was only 3,000 pages as opposed
5 to the 8,000-page agenda that I usually get, and I did
6 manage last night staying up until a little past midnight to
7 get through all of the items on the agenda that are listed
8 as new. There are also a number of items on the agenda that
9 have been on prior agendas, and my goal today before we
10 separate is to at least get to every item that is new and
11 address it, and rule on it to the extent that I can.

12 As to the items that are not new, most of them are
13 items that have already become ripe and I just haven't
14 gotten to, as you know, and I continue to work on those.
15 And unfortunately, as I've said before, this is really kind
16 of a triage, and new things come up that need attention
17 which sometimes keep me from getting to things that are
18 older but ripe, and I know that, and continue to try to get
19 to that stuff; but I am going to try and get to today
20 everything that is listed as new and help you get past those
21 issues.

22 And as I said, the first one I want to address is
23 agenda item number 190, which has to do with task force
24 members and defendants for additional time with those task
25 force members in deposition, and also addressing the law

1 enforcement privilege and the *Touhy* objections that have
2 been raised by DOJ.

3 I'm going to start by simply asking the questions of
4 defendants, how much more -- assuming that I say yeah, you
5 can have what you want, how much more time do you need with
6 each of the three deponents who were task force members?
7 Also, how much time have you already had?

8 THE WITNESS: Special Master Cohen, this is
9 Laura Wu from McKesson. We expect we would be able to
10 complete the continued depositions of three depositions, the
11 depositions of Detectives Prince, Leonard, and Baker-Stella,
12 all within a period of about eight hours. Each of these
13 depositions was started originally related to local law
14 enforcement exclusively, and then reopened once *Touhy*
15 clearance had issued.

16 In the depositions which focused on the task force
17 diversion activities, defendants were stymied at every turn
18 with hundreds of instructions not to answer --

19 SPECIAL MASTER COHEN: Right, I read the
20 arguments. I just need an answer to my question. How much
21 time do you need?

22 MS. WU: I think one day for all three
23 witnesses.

24 THE COURT: One day total, so call it two and
25 a half hours each.

1 THE WITNESS: That's my best estimate.

2 SPECIAL MASTER COHEN: And how much time did
3 you have with each already?

4 MS. WU: We have had a full deposition day
5 with each of them. With Detective Prince we I believe have
6 had more than seven hours. His deposition was reopened
7 based on the Cleveland document production failures in
8 addition to the *Touhy* clearance issues, so he stands in a
9 slightly different respect.

10 SPECIAL MASTER COHEN: Okay. Mr. Bennett,
11 here is what I'm thinking. I've read the briefs that have
12 been submitted, the letter briefs that have been submitted
13 by the parties. First of all, it seems pretty clear to me
14 there's both statutes and case law that say that *Touhy* regs
15 don't apply to law enforcement officers when they're
16 deputized to a federal task force, and also that they are
17 not deemed federal employees. So I think that objections
18 based on *Touhy* are questionable at best.

19 I also think that the law enforcement privilege is
20 limited, and you've seen, I'm sure, the same language as I
21 have, there's a case *United States v. Quebe*, Q-U-E-B-E, that
22 talks about what information is privilege and what isn't.

23 What I'm seeing when I review the transcript is that
24 the invocations of law enforcement privilege are probably
25 more broad than are required. I am completely sympathetic

1 to the law enforcement privilege, the last thing I want to
2 do is because of this litigation get in the way of any
3 ongoing enforcement actions or to divulge any law
4 enforcement techniques.

5 So what I think needs to happen is I think it's
6 appropriate to allow these depositions to continue over the
7 course of one day for the three of them. I'm going to limit
8 them to two hours each. I'm going to attend those
9 depositions, and I'm going to be sitting there, and I'm
10 going to rule on the law enforcement privilege scope.

11 As I say, I think that some of your objections were
12 appropriate, but I think that some of them might have gone
13 too far, and that there's information that could be elicited
14 that is fair for the defendants to obtain.

15 So the question really is a matter of scheduling. And
16 I'll stop there and ask if you have any questions or
17 thoughts.

18 MR BENNETT: Thank you, Special Master Cohen.
19 This is James Bennett from the Department of Justice.

20 I want to make two points. The first point is the
21 idea that the *Touhy* regulations do not govern federal task
22 force officers. Respectfully, Special Master Cohen, that is
23 an issue that both myself and the department would strongly
24 disagree with. We believe that it does in fact, and there
25 is a definition contained in the *Touhy* regulations, which is

1 that I think it's 28 C.F.R. 16.21(b), that would include the
2 task force officers. The statute that is cited by the
3 defendants is the general enabling statute where the task
4 force officers are deputized, and it says they're not
5 federal employees. That deals with the statute regulations
6 that deal with civil service and competitive exams, and
7 things like that.

8 So will be an issue that we would have to have the
9 special master write an official decision on and we would
10 have to object to it. It's that vitally important, not just
11 for these three task force officers, but for all the other
12 task force officers that may be involved in the case going
13 forward, as well as implications that would have around the
14 country. So that would be the first point I would make
15 regarding whether or not the *Touhy* regulations apply.

16 The second point I wanted to make was that the idea
17 that the United States -- and I'm not speaking for the
18 plaintiffs here, but that the United States for the vast
19 majority of the objections raised that based on law
20 enforcement privilege, would be incorrect. This is a case
21 where the U.S. Attorney designee authorized these three task
22 force officers to disclose official Department of Justice
23 information. That authorization specifically set out what
24 they were and were not allowed to testify about.

25 I think we now have a very good roadmap of what the

1 defendants want, and my suggestion is these officers are
2 prohibited by law from disclosing stuff that they haven't
3 been authorized to even if it might be discoverable, and I
4 believe that a number of the questions that were asked may
5 be authorized, or at least a substantial portion of the
6 information would be authorized if they submitted an amended
7 request and that got to be vetted, but some of the questions
8 that were asked that they complained we did not let the
9 officers answer was because those answers might have
10 implicated or definitely would have implicated privileged
11 information, including but not limited to information that
12 would be protected by 6(c) because it was Grand Jury
13 information, confidential law enforcement techniques, the
14 effectiveness of which would have been impaired, and so
15 forth.

16 So the U.S. Attorney designee should have the ability
17 in the first instance to determine whether or not that
18 information is privileged or not, and so we would
19 respectfully request that opportunity first. And then if
20 the parties/defense disagrees then they could challenge
21 those specific limitations once they have more specific
22 questions to determine whether or not there was an
23 appropriate invocation of privilege or statutory
24 prohibition.

25 SPECIAL MASTER COHEN: Let me say a few

1 things, one of which I'm glad you brought up.

2 You said that you're going to need me to essentially
3 formalize my order and write it down so that you have an
4 opportunity to object. If you look at my appointment order,
5 what it says is that a ruling needs to be either issued by
6 me on the docket or in front of a court reporter.

7 We're in front of a court reporter today, so the
8 rulings that I issue today on any matter are of record.
9 They are ready to be objected to. There's nothing more that
10 I need to do. If any of you want to object to any ruling,
11 you have the whatever period, three-day period I think it
12 is, or -- no, whatever it is. You have the normal period to
13 object to those rulings.

14 And in most cases in sum I may issue something in
15 writing, in most cases I will not. So to the extent you
16 want to object to a ruling, you should take my rulings today
17 as the rulings that you are going to object to. That's the
18 first thing.

19 The second thing --

20 MR. BENNETT: Thank you for that
21 clarification. I didn't know the rule. My apology.

22 SPECIAL MASTER COHEN: No problem, no problem.
23 This is only the second time I think that we've done this.

24 So here is what I'm reading, Mr. Bennett, and I'm
25 making this a part of my ruling. I'm reading 21 U.S.C. §

1 878(b). And it says, quote, State and local law enforcement
2 officers performing functions under this section shall not
3 be deemed federal employees. It's not talking about civil
4 servants, it's talking about law enforcement officers.

5 I'm also looking at a case called *Felix v. New York*
6 *City Police Department*, 1991 Westlaw 251660, out of the
7 Southern District of New York in 1991. And it essentially
8 says that DOJ's *Touhy* regs do not apply to local law
9 enforcement officers when they're deputized to a federal
10 task force.

11 So those both seem to be directly on point. And I
12 simply disagree with you as a matter of law that these law
13 enforcement officers are quote/unquote prohibited by *Touhy*
14 from answering these questions. That's not how I understand
15 *Touhy* to work.

16 The other -- then I will jump to I'm not sure I
17 understood what you said about what procedure you would like
18 to take place to address the law enforcement privilege
19 concerns that you have. My ruling is that the depositions go
20 forward and the questioning goes forward, and if what you're
21 saying is that you want submission question by question
22 beforehand so that you know what to object to, that's just
23 not workable.

24 MS. WU: Special Master Cohen, this is Laura
25 Wu. I would also state that we have complied with the *Touhy*

1 process, and under the Sixth Circuit law as well as Judge
2 Polster's rulings in this case, *Touhy* itself does not weigh
3 on your ruling as to what is discoverable, and therefore we
4 can only address any privileges raised by the government on
5 a question-by-question basis live during a deposition.

6 And I would also note that both on the -- during the
7 hearing today and in its papers the government has disavowed
8 any law enforcement privilege claims. That happened over
9 and over in the depositions as the lawyers taking the
10 depositions requested that the government state the basis
11 for its instructions not to answer.

12 SPECIAL MASTER COHEN: Yeah. And let me just
13 add, look, this is going to go forward according to my
14 ruling unless you get it reversed by the Court through
15 objection.

16 And if it gives you any solace, Mr. Bennett, I'm not
17 going to open the floodgates to questions. I just think
18 there are certain areas where you were super-extra-careful
19 where you didn't need to be. I don't know what solace that
20 gives you, but I'm just giving you some insight into how I
21 anticipate this is going to go forward.

22 MR. BENNETT: This is James Bennett again.
23 Thank you for that, Special Master Cohen. I guess the first
24 thing that causes me concern, and I just want to make sure I
25 understand, is that your ruling is that the *Touhy*

1 regulations do not apply to federal task force officers, and
2 as a result, the United States would not have any standing
3 to even object to the questions. Am I misunderstanding
4 something?

5 And I will point out to the Court that in our
6 brief -- I'm sorry, to Special Master -- in our brief letter
7 that we sent you we did cite to the case of *Mayo v. City of*
8 *Scranton*, which specifically rejected the arguments that the
9 defendants make, and also to 28 C.F.R. 16.21(b), which
10 defines the term "employee" for purposes of the regulation
11 different than what 21 U.S.C. 878 defines the term "federal
12 employee" for purposes of those statutes.

13 So I do believe that there is law that supports the
14 government's position, and *Felix* does not even address the
15 statute -- I'm sorry -- the regulation at issue, which is 28
16 C.F.R. 16.21, *et seq.* And so I guess that would be the
17 first point of clarification I would ask to make sure that I
18 understand the Court's ruling, the Special Master's ruling
19 that the TFOs are not employees for purposes of the statute
20 such that the United States would not have standing to even
21 object.

22 Regarding the second issue, which was the point that
23 we were making, the employees have to look to the statute
24 themselves and the regulations, and 28 C.F.R. 16.22(a) says
25 that no employee in response to the demand shall produce

1 information without prior approval.

2 So the offsets that I was envisioning was that the
3 prior approval would be obtained for these additional
4 questions or additional areas of information that were being
5 asked about in the depositions that were not originally
6 included in the authorization.

7 THE COURT: All right. Well, let me ask you a
8 question. Were you making objections only based on *Touhy* or
9 were you making objections also based on law enforcement
10 privilege?

11 MR. BENNETT: There were objections that were
12 based on more than just *Touhy*. There were certainly law
13 enforcement-sensitive information that we objected to, but
14 most of the objections and all the ones that I know of that
15 were complained about by the defense were all as a result of
16 being outside the scope of the authorization and instructing
17 the witnesses that under 16.22(a) they were not currently
18 authorized to disclose that information.

19 SPECIAL MASTER COHEN: All right. So here is
20 what makes sense: What I had thought we would do was that
21 we would get together and I would rule on the law
22 enforcement privilege objections that you made or were going
23 to make during the two hours each additional, and that there
24 would be no *Touhy* objections based on scope. But it sounds
25 to me like what you just said is you think that you can go

1 back to DOJ, get additional authority, and maybe avoid some
2 of what I just said, and that makes sense to me. I know
3 you've done that before in other instances, you've gone back
4 to DOJ and gotten additional scope under *Touhy*.

5 I think that you probably already know what it is, the
6 additional scope you would need to obtain, but it also only
7 makes sense for the defendants and you to clarify that
8 before you go back and make sure that everything they want
9 you to ask for is what you ask for.

10 So does it make sense? Do you think it makes sense
11 for the defendants and you to get together, figure out what
12 additional scope you would seek, to do it quickly and to
13 receive that? And I still think it makes sense for me to
14 sit in the depositions and rule on law enforcement privilege
15 objections, but to get that done first, and then I don't
16 have to say that you're not -- that *Touhy* doesn't apply.

17 MR. BENNETT: This is James Bennett from the
18 Department of Justice.

19 I would agree on both of those counts. Number one, we
20 would be happy to meet and confer with the defendants and go
21 back and see what additional authorization for questions
22 that they asked in the deposition or anything else that
23 they've come up with could be authorized.

24 And second, I would also agree a hundred percent that
25 it makes a lot of sense to have you present at the

1 deposition if you're willing and available. I think that
2 will eliminate a lot of the parties' concerns as we go
3 through that. So the United States would support both of
4 those two things.

5 MS. WU: Special Master Cohen, this is Laura
6 Wu. I'd like to highlight the fact that the questions that
7 we want to ask, we/the defendants want to pose to these
8 witnesses, are within the scope of *Touhy* clearance received.
9 It's only as applied in the depositions in a rather
10 aggressive and nonsensical way that the *Touhy* clearance has
11 been used to shield important discovery in this case.

12 And I realize that these technical discussions about
13 whether a statute or a DOJ's regs are highly interesting, I
14 agree, but we can move more quickly to the Sixth Circuit
15 authority *In re Bankers*, which makes clear that that
16 decision doesn't really hold water in this case. In any
17 case it's the Federal Rules of discovery and privileges
18 which govern what discovery is permissible in this case.

19 We have gone through the *Touhy* process, and no further
20 process with *Touhy* is necessary. Instead, a ruling would
21 allow us to move forward immediately to get these
22 depositions completed efficiently. No further *Touhy* process
23 is required under Sixth Circuit law. And Judge Polster has
24 ruled consistent with *In re Bankers* already in this case
25 when confronting ARCOS data issues.

1 SPECIAL MASTER COHEN: All right. So I'm
2 going to tell you to go back to work with DOJ to get this
3 done. It just makes more sense to work together. If I
4 don't have to rule, I'm not going to. I'm going to sit in
5 the deposition.

6 Mr. Bennett, how long do you think it will take after
7 you meet with the defendants to get a response from DOJ?

8 MR. BENNETT: Generally, just for this project
9 it wouldn't take long. However, I'm sure you're keenly
10 aware there are a number of other requests and issues and
11 matters pending, and the DOJ has, you know, finite
12 resources.

13 THE COURT: Give me a rough guess.

14 MR. BENNETT: Let me ask this. And I hate
15 answering a question with a question, and I apologize, but
16 what would the Special Master deem to be the outer extent of
17 the reasonable amount of time that you would let us have to
18 do it?

19 SPECIAL MASTER COHEN: A week. I mean, this
20 is an increment of what you already have. You already know
21 exactly what it is the defendants have sought. I think it
22 would be pretty quick for you by the end of this week for
23 sure to state what additional areas of inquiry you're
24 seeking. And like I say, it's just an increment. So
25 whoever you went to last time, just say remember what we

1 said before? Now it's X plus A.

2 MR. BENNETT: I guess you're saying by the end
3 of this week, so in 48 hours? That wouldn't be something
4 that I could --

5 SPECIAL MASTER COHEN: No; that you're going
6 to meet with the defendants.

7 MR. BENNETT: Okay.

8 SPECIAL MASTER COHEN: And then by this Friday
9 take the request back to DOJ, and within a week hear back.

10 MR. BENNETT: Yes. I think the problem is we
11 have a 30(b)(6) deposition that I'm in all day tomorrow, and
12 Joe Rannazzisi's deposition that we're in all day Friday, so
13 I'm not sure of the availability to meet with the defendants
14 over the next 48 hours.

15 MS WU: Special Master Cohen, again, we could
16 schedule the depositions. The *Touhy* clearance at this time
17 should not be a barrier. Instead, the Federal Rules and any
18 law enforcement privilege claims under clear Sixth Circuit
19 law and the law of this case rule the day. Let's just
20 reschedule these. I'm happy --

21 SPECIAL MASTER COHEN: You're going to get the
22 depos, it's just a matter of when. And I'm trying to get it
23 to happen as soon as possible, but I'm not going to pound
24 the table about it.

25 So Mr. Bennett --

1 MR. BENNETT: I would be available Monday to
2 meet with the defendants, and then would hope to have by the
3 following Monday the authorization letter completed. Would
4 that be a reasonable time?

5 SPECIAL MASTER COHEN: The authorization
6 letter to or from DOJ?

7 MR. BENNETT: The authorization letter from
8 DOJ that grants any additional --

9 SPECIAL MASTER COHEN: That's fine.

10 MR. BENNETT: -- by the following --

11 SPECIAL MASTER COHEN: That's fine.

12 MR. BENNETT: The authorization letter done by
13 the following Monday.

14 SPECIAL MASTER COHEN: Okay, so that's what
15 we're going to shoot for.

16 MR. CLUFF: Special Master Cohen, this is
17 Sterling Cluff from Baron & Budd, on behalf of Cleveland. I
18 have just a scope question about your order.

19 From the discussion the parties have been having, it
20 sounds like the scope of your order relates to these
21 witnesses who work exclusively as task force officers on the
22 DEA's Tactical Diversion Squad. Is that what you're
23 ordering them to be brought back to be deposed about in
24 these two hours?

25 SPECIAL MASTER COHEN: Yes, but also I know

1 that there were questions asked about their work before they
2 were on the task force to which law enforcement privilege
3 objections were made, and if those questions are asked again
4 and I conclude that the law enforcement privilege argument
5 isn't well taken, then they'll have to answer it. So I
6 think what you're asking is are you limited to asking
7 questions about the work they did only while they were on
8 the task force, and the answer is no.

9 MR. CLUFF: Understood. Thank you.

10 SPECIAL MASTER COHEN: Okay. Let's move on.
11 Thank you, everybody.

12 MS. WU: Special Master Cohen, there's a
13 related issue, documents that have been clawed back.
14 Perhaps we can confer with Mr. Bennett on that issue --

15 SPECIAL MASTER COHEN: Yeah.

16 MS. WU: -- and deal with it at the
17 rescheduled depositions.

18 SPECIAL MASTER COHEN: Right. And I think the
19 clawbacks may be related to the *Touhy* scope, and so I agree
20 that that should be addressed.

21 MS. WU: Okay, thank you.

22 SPECIAL MASTER COHEN: All right. Thank you
23 everybody on that one. Mr. Bennett, I think that's it for
24 you, so if you guys want to sign off, that's fine.

25 MR. BENNETT: All right. Thank you, Special

1 Master Cohen. Renee and I are exiting the call now.

2 THE COURT: All right. Let's dive into the
3 fun one. Number 200 is the plaintiffs' -- excuse me -- the
4 defendants' motion to strike plaintiffs' experts.

5 MS. WELCH: Special Master Cohen, Donna Welch
6 on behalf of the defendants. Given the breadth of the
7 issues involving specific experts, there may be others who
8 are here in person or on the phone who will need to join in.

9 SPECIAL MASTER COHEN: That's fine.

10 MS. WELCH: I want to start --

11 MR. WEINBERG: Before you get started -- Peter
12 Weinberger -- Ms. Rendon is in the room, and in view of the
13 disqualification of Ms. Rendon with respect to Cuyahoga
14 County, and in view of the fact that a number of the experts
15 address Cuyahoga County damages and those sorts of issues,
16 we have a concern.

17 MS. WELCH: I don't believe any specific
18 details about the reports themselves will be discussed on
19 the record today, Pete.

20 THE COURT: I hear your concern. I think that
21 this is 99 percent procedural. If as we go through this
22 your concern heightens then let me know, but I think we can
23 get through this without that concern.

24 MR. WEINBERG: Thank you.

25 SPECIAL MASTER COHEN: And Ms. Welch, let me

1 start. Let me ask a few questions. First of all, let's
2 figure out who we're talking about. I believe from the
3 submissions to me that we're talking about Cutler and
4 Gruber, Rosenthal, Liebman, McCann, and Young. Those are
5 the experts whose reliance materials defendants say came
6 late or who supplemented slash amended their reports after
7 the March 25th deadline. So let's just --

8 MS. WELCH: There are others, Special Master
9 Cohen.

10 SPECIAL MASTER COHEN: Who are they?

11 MS. WELCH: So I believe you mentioned McCann.
12 We agree. Schondelmeyer was not on your list.

13 SPECIAL MASTER COHEN: Right.

14 MS. WELCH: Liebman we agree. Alexander,
15 Rosenthal, Gruber, Cutler, and Young.

16 SPECIAL MASTER COHEN: So the only ones that
17 you added to my list were Schondelmeyer and Alexander, and I
18 do remember Schondelmayer. Remind me who Alexander is.

19 MR. MIGLIORI: You have Alexander on your
20 list, Your Honor, at least on the agenda.

21 SPECIAL MASTER COHEN: Is that a separate
22 agenda item?

23 MR. MIGLIORI: It's listed in the motion.
24 Alexander is the epidemiologist that has the 15 areas of
25 redress for nuance abatement.

1 MS. WELCH: Yeah, national abatement costs.

2 SPECIAL MASTER COHEN: One second.

3 MS. WELCH: He's addressed at page 5 of the
4 defense --

5 SPECIAL MASTER COHEN: Got it.

6 MS. WELCH: -- emergency motion reply, and in
7 Exhibit A.

8 SPECIAL MASTER COHEN: All right. So here is
9 the first thing I want to know. I want to take them one at
10 a time. We've got Cutler and Gruber kind of taken together.
11 Rosenthal, Liebman, that's L-I-E-B-M-A-N, McCann, and Young.

12 MS. WELCH: And to the extent it's helpful, we
13 think they fall into a few buckets that may make the
14 argument on the issues more efficient.

15 SPECIAL MASTER COHEN: That probably would
16 help, but the first question I have is that it's clear that
17 there were some reliance materials that were produced after
18 the deadline. It's clear that there was supplementations
19 and amendments that were produced after the deadline.

20 For example, there was the whole bit about the data
21 usage agreement that took forever to iron out, but I believe
22 is now ironed out, and that had to do with --

23 MR. MIGLIORI: Cutler and Gruber.

24 SPECIAL MASTER COHEN: Thank you -- Cutler and
25 Gruber.

1 What I want to know is with which experts was there --
2 are there any experts where all of that stuff wasn't ironed
3 out more than two weeks before their depo?

4 MS. WELCH: Yes.

5 SPECIAL MASTER COHEN: Which ones wasn't
6 ironed out more than -- within two weeks of their depo?

7 MS. WELCH: Which were not you're asking?

8 SPECIAL MASTER COHEN: Which were. For
9 example, I think the Cutler and Gruber, it took a while to
10 get the data usage agreement, it's now ironed out. Was it
11 ironed out, was everything kind of fixed and dealt with more
12 than two weeks or more than their depo?

13 MS. WELCH: So I believe the data was produced
14 finally on April 17th. We have dates for deposition that I
15 understand have been confirmed for Gruber on the 25th, which
16 is within the two-week period, not outside a two-week
17 period. And for Cutler, on the 26th and 27th; again, not
18 within the two-week period.

19 SPECIAL MASTER COHEN: Okay. Can you go down
20 the rest of the list?

21 MR. MIGLIORI: I have it handy, if it's easier
22 for us to do it in terms -- we've actually identified the
23 time between deposition.

24 SPECIAL MASTER COHEN: Go ahead.

25 MR. MIGLIORI: So for Cutler and Gruber, it is

1 in fact nine days for Cutler, pointing out that it's only a
2 very small amount of redacted information that was actually
3 in the report that couldn't be unredacted until this form
4 was filled out. So it was it's not a new opinion, it's just
5 the redactions that we could not undo or --

6 SPECIAL MASTER COHEN: But it was also data on
7 which he relied.

8 MR. MIGLIORI: Correct.

9 MS. WELCH: Correct.

10 MR. MIGLIORI: So I want to make sure it's
11 specific to that one issue and the unwillingness of the
12 defendants to sign the original agreement.

13 THE COURT: Go ahead.

14 MR. MIGLIORI: On Gruber, right now the date
15 is the 25th, so that would be eight days.

16 For Rosenthal, we have 16 days before the May 4th and
17 May 5th depositions, so that's after two weeks.

18 For Liebman, it was all provided 26 days before
19 deposition.

20 For McCann --

21 MS. WELCH: And to be clear, we believe there
22 still remains significant deficiencies with respect to
23 Liebman --

24 MR. MIGLIORI: Okay.

25 MS. WELCH: -- as is laid out in the reply and

1 Exhibit A.

2 MR. MIGLIORI: We can debate that. Our
3 position is that that's all been provided. Everything
4 that's been requested has been provided.

5 On McCann, yesterday this came up before the Court,
6 this is that very fundamental base ARCOS data issue: How
7 are we going to take the raw data and make it available. It
8 was represented in Court yesterday by one of the defense
9 counsel that they hadn't received anything. What they were
10 looking for was the actual coding that was used for the
11 platform that our expert McCann used, and that was a process
12 we told them would be available yesterday; and in fact I
13 confirmed that it was in fact produced yesterday. There was
14 one small file I think produced this morning that was
15 inadvertently left out, but that's been produced.

16 The defendants have not set a deposition for that --

17 MS. WELCH: If I could pause on McCann.

18 Just so you know, Special Master Cohen, from the
19 defense perspective, the issues with McCann's wholly new
20 report served on the 15th of April without permission, and
21 the April 3rd supplement, there are significant issues that
22 go well beyond the deficiencies in the reliance materials
23 produced.

24 MR. MIGLIORI: We're prepared to address that,
25 Your Honor. As you know, there was SOMS and diversion

1 witnesses that were allowed to extend to April 15th.

2 SPECIAL MASTER COHEN: I know, go ahead.

3 MR. MIGLIORI: As it relates to -- and by the
4 way, the defendants on McCann have not chosen any of the
5 proposed dates, so as of yesterday we believe that the
6 coding and reliance material requested has been produced.
7 We offered May 1st to May 8th. We're just waiting to hear
8 what date. And I think yesterday the Court gave us
9 essentially through June 1st to try to figure out some
10 methodology of understanding what we did, meeting and
11 conferring on it, having a deposition, and coming up with
12 some kind of evidentiary agreement.

13 That is one of the most critical witnesses for all
14 of -- as a foundation for all of our experts.

15 For Young --

16 MS. McENROE: Hold on. Before we move on, if
17 you guys can hear me, this is Elisa McEnroe from Morgan
18 Lewis. I want to make sure we're clear on McCann.

19 Yesterday dates were provided by plaintiff for
20 McCann's deposition of May 9th to 10th and May 13th to 14th.
21 The data was produced very early this morning. We are in
22 the process of reviewing it before we are going to accept
23 any deposition dates.

24 Defendants had asked for deposition dates between May
25 1 and May 8, which would be prior to the May 10th deadline

1 for defendants' experts, but the dates that were provided by
2 plaintiffs are not until the 9th and 10th or 13th or 14th.

3 I just wanted to make sure that part of the discussion
4 was clear.

5 MR. MIGLIORI: Okay. And the last, for Young,
6 Your Honor, the raw data was again an issue that related to
7 very specific database materials, how to get in to actually
8 access it. It's data that was available online. There was
9 some instruction back and forth how to get it, Cornell
10 University housed it.

11 That apparently has been confirmed as being exchanged.

12 MS. WELCH: My understanding is there is still
13 data use restrictions that prevent our experts from
14 utilizing the data, the data that was provided for the first
15 time on April 16th.

16 MR. MIGLIORI: That the deposition in Young is
17 May 14th, and there are some user agreement issues that
18 still have not been agreed to by the defendants. We
19 actually point out that instead of meeting and conferring on
20 it we got this motion instead, but we were trying to work
21 out the discrete user agreement issues on accessing this
22 public database, not a database that this witness actually
23 maintains or controls.

24 The Alexander issue is there are corrections to
25 Alexander that were made that were made on April 3rd. A

1 subsequent spreadsheet producing certain information that
2 was specifically requested was provided on April 17th. That
3 deposition is set for the 25th and 26th, which is 22 days
4 after the April 3rd. And the spreadsheet, which again was
5 requested by the defendants, that was produced eight days
6 before this deposition.

7 Alexander's issues are very discrete. They're limited
8 to a very small part of the testimony, so it's not a
9 substantial production of spreadsheets. It relates to five
10 paragraphs of his 60-page report on valuation of abatement.

11 I'll point out for both Liebman and for Alexander that
12 valuation portion of an abatement case traditionally is even
13 done post-trial, that is it's a subsequent proceeding.
14 There's certainly no prejudice there.

15 Schondelmeyer is not really an issue in terms of
16 producing information. Schondelmeyer is that witness that
17 talks about the entire closed system. It's a
18 visibility-type witness. It's actually the kind of witness
19 the Judge was referring to yesterday, "Maybe we can start
20 with somebody that explains how all this works within the
21 system," which very much goes to both the SOMS and the
22 diversion issues, that is the visibility throughout the
23 closed system. And then he actually has some 50 opinions or
24 references to different defendants and how they fit within
25 that closed system and their obligations under both SOMS and

1 diversion.

2 So I think there are just a couple words less than 14
3 days where the data provided are not within two weeks.

4 MS. WELCH: Special Master Cohen, it would be
5 helpful if we could have a little time to frame these issues
6 from our perspective. Plaintiffs' argument goes to data
7 deficiency issues, but I think misses from our perspective
8 the larger point, the reason the emergency motion was
9 brought. It is clear, and I don't think anybody would
10 dispute that this is an expert-driven case. Plaintiffs came
11 forward with 19 experts. There are novel expert theories,
12 untested theories. And the Court in denying our emergency
13 motion made it clear that CM08 is to be strictly adhered to.

14 And the problem here goes well beyond a failure to
15 timely provide all of the reliance materials. The problem
16 here is that plaintiffs have flagrantly violated CM08 and
17 your May -- excuse me -- your March 19th order. The result
18 is that we are rocketing forward on expert discovery where
19 defendants are getting supplemental reports that provide not
20 a new spreadsheet or a new paragraph or two, but new models,
21 new regression theories, whole cloth new reports.

22 They did this without meeting the standard laid out in
23 CM08, which was that they could request the ability to you,
24 make a request to you to supplement if there were new facts
25 and information that came out after the March 25th deadline,

1 and that with permission from you they could supplement.

2 They came one time to the Special Master and asked for
3 a supplement. They came on the 13th of March, and you
4 granted in part and denied in part their request. You gave
5 them leave not to file four SOMS reports but up to four SOMS
6 reports based on their claims that they needed the DEA
7 depositions to occur, and based on their claims that certain
8 distributors had allegedly belatedly produced documents.

9 They did not come back and seek permission for any of
10 the other supplements. They didn't because they couldn't
11 meet the standard laid out in CMO8, which is supposed to be
12 the law of the land.

13 SPECIAL MASTER COHEN: Let me interrupt you.

14 MS. WELCH: And the problem here, Special
15 Master Cohen --

16 SPECIAL MASTER COHEN: Because you're just
17 repeating --

18 MS. WELCH: -- it is not being applied fairly.

19 SPECIAL MASTER COHEN: Let me interrupt you,
20 please.

21 So if there's a theme to this litigation, it is that
22 everybody ain't getting everything they want. And that's
23 largely due to the speed with which we've all been directed
24 to proceed through this litigation, including trial, which
25 we even all talked about yesterday. And I've said before

1 that, you know, that my goal is to make sure everybody gets
2 roughly 80 percent of what's out there, because that's
3 probably enough for everybody to win or lose the case.

4 And I could point to and everybody could think of
5 multiple instances where discovery is being produced after
6 deadlines that everybody wishes they could have gotten
7 earlier so they could have asked other deponents about it,
8 so they could have given it to their experts, and so on and
9 so forth. And the last thing you mentioned was to make sure
10 that this is all being imposed fairly. I totally get that,
11 and that's entirely what I'm after.

12 It seems to me that virtually all of what I'm looking
13 at here with all of these experts is caused by these time
14 limitations, and the same thing is going to happen with
15 defendants; probably even more large because the defendants
16 have roughly five times as many experts. The same issues
17 are going to arise.

18 Now, I'm not suggesting that defendants should think,
19 ah-hah, well then I guess we are not going to provide our
20 reliance materials and make the plaintiffs fight for it,
21 because if I see any hint of that then I'm going to have to
22 address it firmly. But there is no way to avoid that things
23 like this will happen on the plaintiffs' side, too.

24 And what I'm after is making sure that the defendants'
25 counsel and the defendants' experts get most of what they

1 need in time to understand what the opinions are, to be able
2 to ask questions at depositions, and, let's be frank, to
3 address it at trial. In other words, even if some of what
4 you get comes after a deposition, which has happened in many
5 cases already, that discovery comes after a deposition, it's
6 not like you don't get to use it. It's not like you're not
7 going to ask questions on those points.

8 So --

9 MS. WELCH: We understand that, Special Master
10 Cohen. We think there are a few easy ones here that aren't
11 just about a little bit of delay with respect to reliance
12 materials, where fundamental fairness really does require
13 serious consideration and, in our view, an order striking.

14 SPECIAL MASTER COHEN: All right. Give me
15 that third bucket then.

16 MS. WELCH: McCann's whole cloth new report
17 was issued on April 15th.

18 SPECIAL MASTER COHEN: I've got an idea how to
19 deal with that. Go to the next one.

20 MS. WELCH: Let me make the point on that
21 report, David, that you don't need to look beyond
22 paragraph -- the first full paragraph of Miss Singer's
23 nine-page response to our motion served on April 19th to
24 understand that there was no reason, nothing new that
25 required them to serve this weeks after CMO8 required it to

1 be served.

2 THE COURT: Go ahead.

3 MS. WELCH: She recognizes --

4 SPECIAL MASTER COHEN: No, go ahead to the
5 next one. Go ahead to the next one.

6 MS. WELCH: Totally new.

7 The Schondelmeyer report is a purported SOMS report.
8 We do not believe it falls within the extension that you
9 granted. Schondelmeyer is not a DEA expert or a SOMS
10 expert. He doesn't cite to or discuss the DEA depositions
11 that prompted their request for an extension. We think
12 fundamental fairness says let's do some culling of this case
13 now, and strike the April 15th McCann and Schondelmeyer.

14 With respect to the other supplements that were just
15 self-help extensions in disregard of CM08, from our
16 perspective that's Liebman and Alexander, to paint these as
17 we've got an extra spreadsheet here, an extra paragraph
18 there, is crazy when you dig in.

19 SPECIAL MASTER COHEN: So in your third bucket
20 you're putting Schondelmeyer, Alexander, Liebman, and
21 McCann. Anybody else?

22 MS. WELCH: No.

23 SPECIAL MASTER COHEN: All right.

24 MS. WELCH: Although be to clear, that's two
25 separate buckets, we believe.

1 SPECIAL MASTER COHEN: Schondelmeyer and
2 McCann are in the first.

3 MS. WELCH: We believe the 4-15 McCann and
4 Schondelmeyer, which were whole cloth new reports, not
5 supplements to anything else, provided on the 15th should be
6 stricken.

7 SPECIAL MASTER COHEN: So --

8 MS. WELCH: We believe the supplements for
9 Liebman and Alexander should either be stricken, or it's not
10 a matter of just now we have their information and even if
11 we get it too close to the deposition we can still use it.
12 The problem for defendants is we've got a May 10th deadline
13 for our experts. And in a case like this, to jam
14 defendants' experts who are trying to analyze, understand,
15 and process supplements that are coming in as late as last
16 night, it makes the 5-10 deadline for our experts who are
17 trying to respond to those reports unworkable.

18 THE COURT: So here is --

19 MS. WELCH: And that applies to obviously the
20 significant deficiencies in productions for Rosenthal,
21 Gruber, Cutler, and Young, which we put in a separate
22 bucket.

23 SPECIAL MASTER COHEN: You keep saying the
24 same thing or same things I've read, and it's frustrating to
25 me, because we have so much to get through. I got your

1 point.

2 So with the SOMS reports, I said that plaintiffs could
3 produce their SOMS expert reports three weeks later. And at
4 the time I said that -- and I don't remember where I said
5 it, but I'm sure I did -- that defendants would get a like
6 extension of time for responsive experts.

7 I know that at the time I was thinking, because this
8 was before I had any inkling of how many experts any side
9 was going to produce, that there would be X SOMS experts by
10 plaintiffs, three or four, and that there would be X the
11 same number of responsive experts from defendants; and in
12 fact, the ratio is more like five to one.

13 In fact, let me ask a question about that. So I'm
14 kind of jumping over to agenda item 198. In the defendants'
15 submissions it says the manufacturer defendants may serve 7
16 to 8 SOM expert reports, the non-manufacturer defendants may
17 serve approximately 16 to 20 SOM expert reports.

18 So a few questions there. First of all, are those
19 numbers in addition to the 98 that y'all said?

20 MS. WELCH: No, that's subsumed.

21 SPECIAL MASTER COHEN: Okay.

22 MS. WELCH: This was really the issue
23 addressed with the Court yesterday, that each defendant has
24 different issues with respect to SOMS.

25 SPECIAL MASTER COHEN: The non-manufacturer

1 defendants it says may serve 16 to 20. Does
2 non-manufacturer defendants mean distributors and pharmacies
3 both?

4 MS. WELCH: That's my understanding.

5 SPECIAL MASTER COHEN: And then it says
6 manufacturer defendants may serve 7 to 8 SOMS reports. I
7 guess I don't understand why a manufacturer needs to file a
8 SOM expert report; I thought that was kind of an issue that
9 was peculiar to the distributors or the pharmacies.

10 MS. WELCH: They've attempted to extend those
11 theories, we don't think appropriately, but they and their
12 experts have attempted to extend it to manufacturers. We
13 need the ability to address them.

14 MR. MIGLIORI: If I can respond to that.

15 The SOMS regulations are addressed to DEA registrants.
16 They apply to manufacturers as they apply to distributors,
17 as they apply to pharmacies. So the analysis that our three
18 experts do are not -- are for each and every one of these
19 defendants. While they say they have to have one for each
20 company, we have these four to actually address all of them.

21 So the idea of they need 28 is not appropriate; but it
22 applies to all DEA registrants, not just distributors.

23 SPECIAL MASTER COHEN: So I look at McCann's
24 supplementation as one of the SOMS expert reports, and there
25 were four others. So I'm seeing five expert reports that

1 were SOMS related, including Schondelmeyer.

2 The question is, what does that mean for my statement
3 earlier that plaintiffs got a three-week extension on the
4 SOMS expert reports and defendants get an equal number?

5 What I'm going to rule is that it's going to be two to
6 one, which is frankly roughly the ratio that I think is
7 appropriate at trial, but that's just an aside.

8 So I'm going to allow defendants to file with a
9 three-week extension of time ten SOM expert reports. What I
10 think that does, among other things, is cure to a large
11 extent all of the issues -- and I don't think they're as
12 serious as defendants make them out to be -- all of the
13 issues that have been pointed out as to all of plaintiffs'
14 experts. That include Cutler and Gruber, Schondelmeyer,
15 Alexander, Rosenthal, Liebman, McCann, and Young.

16 So the bottom line is, I am not striking any experts,
17 I'm not striking any portions of any experts. I'm not
18 concluding that any of the opinions that the experts offer
19 can't be offered, or anything else.

20 I think that the cure comes, first of all, from the
21 ten SOMS experts that I'm allowing defendants to file three
22 weeks later; and second of all, that what goes around comes
23 around, and defendants are going to be faced with the same
24 thing, and aren't going to be allowed to complain about it
25 very loudly. And that's what ends up being fair.

1 And I know, Donna, you don't like it, but that's the
2 ruling.

3 MS. WELCH: Well, respectfully, let me at
4 least make a note on the record that we think not only does
5 it not solve the issue, it exacerbates the issue.

6 This ruling essentially means that there are
7 individual defendants who are being precluded effectively
8 from having a SOMS defense and a SOMS expert. To say that
9 20-plus individual defendant families need to now decide 10
10 SOMS experts across the 20 families --

11 THE COURT: You can put it in an objection.
12 We're moving on.

13 MR. LYNCH: Your Honor -- Special Master
14 Cohen --

15 SPECIAL MASTER COHEN: Go ahead, Mr. Lynch.

16 MR. LYNCH: Yesterday Judge Polster agreed
17 that every defendant is entitled to a SOMS expert. Are you
18 reversing that ruling?

19 SPECIAL MASTER COHEN: If you want to argue
20 that what I just did reversed that ruling you're free to
21 make that objection to the Court, but what I'm doing is
22 coming down with what I think is the most fair way to deal
23 with what is a difficult circumstance.

24 MR. LYNCH: So ten SOMS experts don't cover
25 each defendant.

1 SPECIAL MASTER COHEN: You're going to have to
2 figure out the extent to which --

3 MR. WEINBERG: Controlling the --

4 MR. LYNCH: Don't interrupt, Mr. Weinberger.

5 MR. WEINBERG: Excuse me.

6 MR. LYNCH: Don't interrupt.

7 THE COURT: But both of you need to talk to
8 me, and not each other.

9 MR. LYNCH: Would you direct him not to
10 interrupt, please, Special Master?

11 SPECIAL MASTER COHEN: The answer to your
12 question, Mr. Lynch, is that I have concluded that the SOMS
13 expert reports that come three weeks late, which I allowed
14 them to do, contain opinions that are generally global, and
15 that y'all have to figure out -- look. Y'all have to figure
16 out how to choose ten of your experts who get -- you get to
17 file them all, you get to file every expert report that you
18 said you were going to, 98 of them; three of them you get
19 more time.

20 Which three you get more time to file you're going to
21 have to decide amongst yourselves, and my suspicion is that
22 the expert reports that plaintiffs filed late have some
23 general observations that apply generally to all of the
24 defendants, and that you will be able to find ten experts
25 that can respond in a general way.

1 I'll add one more thing: Maybe he didn't say it
2 yesterday, I don't remember, honestly, but he certainly made
3 it clear, that he thinks that the number of experts that the
4 defendants have as a total is absurd, that there's no way it
5 can possibly happen at trial that you can introduce 98
6 experts, even if all of the defendants are at trial.

7 So you can make whatever argument you want. If you
8 want to object to my ruling, you're free to do that, but I'm
9 telling you that I certainly don't think I'm overruling
10 anything that Judge Polster did.

11 MR. LYNCH: Where did the three come from?
12 I'm having trouble following the numbers here.

13 SPECIAL MASTER COHEN: Three what?

14 MR. LYNCH: You said we could submit three
15 SOMS reports --

16 SPECIAL MASTER COHEN: I said you have three
17 extra weeks.

18 MR. LYNCH: Three extra weeks.

19 SPECIAL MASTER COHEN: Yes, as they did, to
20 file ten of your SOM expert reports.

21 MR. LYNCH: And they get to file
22 Schondelmeyer. Even though all you authorized them to file
23 late was four, they filed five. That's okay?

24 SPECIAL MASTER COHEN: They filed four plus
25 McCann, which was a supplement, and I'm saying, yes, they

1 can do that. They got five, you get ten.

2 MR. LYNCH: I think I've got it. Thank you,
3 Your Honor.

4 SPECIAL MASTER COHEN: You're welcome.

5 MR. STOFFELMAYR: May I ask a clarification
6 question, not on those, related to that issue?

7 SPECIAL MASTER COHEN: Go ahead.

8 MR. STOFFELMAYR: What are we doing about the
9 non-SOMS experts, like the initial McCann report, where, you
10 know, we depose them two weeks after getting the data. His
11 deposition won't take place until after May 10, and I
12 suspect there are others in the same category.

13 Our experts won't be able to do a report that explains
14 what's wrong with Dr. McCann's report until after we have a
15 chance to depose him. It is more than like 48 hours.
16 That's not workable, obviously.

17 SPECIAL MASTER COHEN: So I apologize that I
18 didn't get what you just asked me. Can you just ask it
19 again?

20 MR. STOFFELMAYR: Yes, I'll try again.

21 So there are some experts not in the SOMS category,
22 I'm thinking very specifically because it's important to us
23 of Dr. McCann. His initial report, not the whole separate
24 discussion about the supplement.

25 So his initial report has lots and lots of charts, and

1 one of the back and forth, we don't need to revisit what
2 happened when, but I think as of this morning we believe we
3 hope we finally have the programs that would allow our
4 experts to recreate what he did with the ARCOS data and see
5 does it make sense, does it not make sense, whatever.

6 If we depose him two weeks from this morning -- it's
7 going to take time, our experts were working on it at 6:30
8 this morning. If we depose him two weeks from today, and I
9 don't think he's available exactly two weeks from today, the
10 suggestion was middle of next month; assuming we can find
11 dates that work middle of next month that work for Dr.
12 McCann, his deposition will not take place until after our
13 expert reports are due on May 10.

14 THE COURT: Guess what. You get to
15 supplement, just like they did.

16 MR. STOFFELMAYR: We will be able to
17 supplement after his deposition?

18 SPECIAL MASTER COHEN: According to them, you
19 have an obligation to supplement.

20 MR. STOFFELMAYR: All right. Thank you,
21 David.

22 MR. HYNES: Would that apply with respect to
23 SOM experts if their SOM experts that are not deposed until
24 a few days before our --

25 SPECIAL MASTER COHEN: Can you say your name

1 for the record?

2 MR. HYNES: Paul Hynes for CVS.

3 If some other SOM experts are not deposed until a few
4 days before the original deadline of May 10th for all of the
5 experts and we have some SOM experts that have to serve a
6 report by that May 10th deadline, will we then have an
7 opportunity to supplement to the extent something occurs in
8 one of their SOM experts depositions.

9 SPECIAL MASTER COHEN: The simple answer is
10 yes. The more fulsome answer is that you can't drive a
11 truck through that door. You can't --

12 MR. HYNES: Understood.

13 SPECIAL MASTER COHEN: -- you can't use that
14 as an excuse for every single SOM expert to produce a
15 supplement three weeks later that they then can't depose on.
16 And you, know you're right, this can be exacerbated.

17 Everybody, and frankly y'all you should talk to each
18 other about how to figure this out. I cannot solve every
19 bit of this issue. It's a big issue. I'm doing the thing
20 that I think is most fair. Somebody could easily think I
21 got it wrong; I'm just doing what I think is fair.

22 The answer to your question is yes; the better answer
23 is you need to talk to each other and figure it out, and not
24 abuse it.

25 MR. HYNES: Understood. I just think there

1 are going to be some SOM experts we have that are going to
2 have to go by May 10th under your ruling, and I wanted to
3 know how deal with the situation.

4 THE COURT: And another way to solve it, if
5 it's possible, is to push depos later, if possible.

6 MR. HYNES: Thank you.

7 SPECIAL MASTER COHEN: And I should add, look,
8 I know that the Judge set a deadline as to when -- or rather
9 refused to move deadlines as to when things have to happen.
10 The reason he did that is because he needs the *Daubert*
11 motions made ripe in time to rule on them. So if there is a
12 way for you to agree that some depositions can be taken
13 later because you're not going to *Daubert* them or it's not
14 going to affect the *Daubert* briefing, if you can agree to
15 that, then I'm not going to say you can't do it.

16 MR. MIGLIORI: We understand that. We're
17 willing to meet on that.

18 SPECIAL MASTER COHEN: All right.

19 Well, that was probably enough excitement for a little
20 bit. Why don't we take a five-minute break, and we'll come
21 back and pick up. So we'll take five minutes, and it really
22 will be five minutes.

23 (Recess had.)

24 SPECIAL MASTER COHEN: The next agenda item we
25 are going to address is item number 201. This has to do

1 with defendants' motion to compel follow-ups. I'm just
2 going at read off my ruling on this one.

3 On page 3339 of the agenda begins with the list of the
4 additional questions that defendants want plaintiffs to
5 answer, and I'm going to go through the list, and rule on
6 whether plaintiffs have to do that.

7 Number two, the answer is no.

8 Number five, the answer is yes, but to each
9 sub-question plaintiffs have to answer yes or no. They
10 don't have to go into the reasoning or the why.

11 Number six is no.

12 Number eight is no.

13 Number nine is yes.

14 Number 12 is yes.

15 Number 13 is no.

16 MR. SHKOLNIK: What was that, Special Master?

17 SPECIAL MASTER COHEN: Nine was yes, 12 is
18 yes, 13 is no.

19 MR. SHKOLNIK: Thank you.

20 SPECIAL MASTER COHEN: 15 is yes, but
21 collectively. So the question reads "for each of the 500
22 prescriptions," but there doesn't need to be an explanation
23 for each one individually. So that the question essentially
24 ends up being rephrased as "Explain how these 500
25 prescriptions support your claims for the harm for which you

1 seek to recover in this case."

2 Number 17 is no.

3 Number 18 is no.

4 Number 19 is no.

5 Number 21 is yes.

6 Number 22 is yes; but again, each sub-question has to
7 be answered yes or no.

8 And I think that fully addresses that agenda item.

9 The next one on the list is 188. This is plaintiffs'
10 request to serve a limited number of document subpoenas.
11 The first thing I'm going to note is that, again, this comes
12 back to not enough time to do all the discovery everybody
13 wants to do.

14 The subpoenas that are listed I think are all fair
15 game. I think all of the evidence that is being sought
16 there via those subpoena is fairly sought. The trick is
17 that it's not all fairly sought in Track One because there
18 were discovery cutoffs, and I made clear before that at some
19 time discovery has to end.

20 At that juncture, which I think was January 25th, I
21 said that there would be reciprocal discovery allowed, and
22 the defendants had to choose how many subpoenas and how many
23 depositions they would take, pursue after that date, and the
24 plaintiffs would get an equal amount.

25 Then it's kind of fuzzy, frankly, as to what is

1 quote/unquote after that date.

2 What I conclude is that it is fair as a matter of
3 reciprocity to allow the plaintiffs to serve five
4 subpoenas. I think they wanted to take 15. And they are
5 only document subpoenas. And I'm going to choose which ones
6 they are, to some extent because in some cases I think that
7 the discovery really could have been obtained or the
8 subpoenas should have been sent earlier.

9 And so the subpoena will be allowed to issue from
10 plaintiffs to FDI Consulting, to IntegriChain, to Taft
11 Consultancy Services, and to Impact. And then plaintiffs
12 can choose the fifth one from these choices: Capitol Hill
13 Consulting, Harris Analytics, or Discovery International. I
14 think that that is what makes things fair; that as I've
15 said, that's my polestar.

16 All right. The next one is 191, this has to do with
17 SOM audit reports.

18 MS. STRONG: Mr. Cohen, Sabrina Strong. I
19 don't believe we have had a response from any of the
20 defendants on these issues as to each particular subpoena,
21 and I think it would be appropriate for you to consider a
22 response from the defendants before making a ruling as to
23 which would be appropriate.

24 You referenced IntegriChain, for example, and that in
25 part pertains to my client Janssen. There were documents

1 produced, at least 762 documents concerning Janssen's
2 relationship with IntegriChain that was produced back in
3 June, and certainly before October, so to allow that kind of
4 discovery now really doesn't seem to make sense.

5 But Your Honor, in fairness, you have not heard the
6 position from the defendants with respect to any of these
7 particular subpoenas, and so I would ask you give us an
8 opportunity to respond to those four that you just
9 identified at a minimum, and you could consider our response
10 before making this ruling.

11 SPECIAL MASTER COHEN: I disagree with you. I
12 think I did receive the response. There was a list of the
13 15, and there were responses as to each of the 15 as to, for
14 example -- and some of the ones that I didn't choose I
15 didn't choose because the argument was plaintiffs knew about
16 this a long time ago, they should have subpoenaed it
17 earlier. I took that into account.

18 Maybe you think that I didn't take it into account
19 enough with reference to IntegriChain, but I believe that
20 that subpoena is discovery that as of January 25th it was
21 legitimate for the plaintiffs to seek.

22 MS. STRONG: My understanding, Your Honor, is
23 that we have not had an opportunity to brief these issues
24 for you.

25 SPECIAL MASTER COHEN: Maybe not fully, but

1 they're -- I mean, what you just said, that kind of argument
2 at the very least was presented to me in the communications
3 that I got with respect to at least some of the other
4 subpoenas. So I figure that I've received the defendants'
5 position, and I'm going to sit with what I've got.

6 MS. STRONG: Understood, Your Honor.

7 SPECIAL MASTER COHEN: Thank you.

8 191 has to do with SOMS audit reports. I guess I need
9 to know what is at issue here. I believe that there are two
10 things that I'm seeing from the communications. One is that
11 McKesson agrees that it withheld four SOMS audit reports and
12 says that it agrees essentially with plaintiffs, that those
13 should be submitted to me for *in camera* review.

14 I haven't received them yet, and so I will receive
15 those and review them. That's McKesson.

16 Separately under agenda item number 197, I think that
17 AmerisourceBergen is essentially in the midst of reviewing
18 their SOMS audits and determining the extent to which they
19 have been produced or are going to be put on a privilege
20 log, and there's essentially a meet and confer ongoing. And
21 then a number of defendants have affirmatively responded and
22 said, yeah, we have produced all of our SOMS audit reports.

23 So the first question I have is, beyond the McKesson
24 four and beyond what AmerisourceBergen has said, are there
25 any other SOMS audit reports that are at issue under agenda

1 item number 191.

2 MR. WEINBERGER: This is Peter Weinberger on
3 behalf of plaintiffs.

4 Before we move beyond McKesson, we would like -- we
5 would ask Special Master Cohen that you make a ruling that
6 the docket 4 audit reports be turned over to you immediately
7 for review, for *in camera* review.

8 SPECIAL MASTER COHEN: I think that was
9 agreed, so I'll so rule.

10 MR. WEINBERG: Well, I think there was a date
11 of April 29th that was suggested because they wanted to make
12 arguments to give context to the documents. And our
13 preference, we don't see why pursuant to discovery ruling
14 14-5 that they can't just turn over the documents forthwith
15 with some explanation to give them context, so that we can
16 begin to have you review those and to determine whether or
17 not they are privileged or not.

18 SPECIAL MASTER COHEN: Right. So McKesson
19 should give those to me as soon as possible, meaning this
20 week. They can follow that up with any explanation they
21 need. It's going to take me, you know, more than a day or
22 two to review it, but I can at least start doing that.

23 Go ahead.

24 MR. WEINBERG: Okay. So here is the list of
25 responses that I have, subject to the defendants' correcting

1 me if I misstated anything.

2 Prescription Supply has responded on April 18th that
3 they have no audit reports within the purview of our scope
4 of our request.

5 Allergan has done the same, but we have some issues
6 with respect to that.

7 CVS has indicated that they have reports, that we've
8 asked them to produce them immediately. There was some
9 discussion that they wanted to do it without prejudice to a
10 waiver, or a waiver of the privilege. If they produced
11 them, our request is that they simply produce them per your
12 order.

13 Cardinal, as you know, is an ongoing and separate
14 item, but your ruling specifically ordered them to produce
15 the dendrite document that was the subject of 14-5, and it
16 has not been produced as of yet.

17 And Janssen has responded, indicating that they have
18 no -- that they have reviewed their documents, they have no
19 additional audit reports. We may have some issues with
20 respect to that.

21 And Purdue this morning sent a fairly lengthy e-mail
22 indicating that they do have an audit report that's on their
23 privileged log and that they are maintaining the privilege
24 argument, claiming that it does not come within the ambit of
25 disclosure as set forth in your discovery ruling 14, part 5.

1 I frankly haven't had a chance to look at it in
2 detail, but that is where we stand.

3 With respect to so that's one -- that's three --
4 that's seven defendants. With respect to the other
5 defendants, we have not heard anything.

6 MR. REED: Special Master Cohen, Steve Reed
7 for Teva. We haven't sent an e-mail, but I'm happy to give
8 a report where we stand.

9 There are actually two categories of documents at
10 issue for us. One is a group of documents related to a
11 privileged review that was done back in 2012. Those were
12 actually inadvertently produced. We have a clawback letter
13 out, and we have been meeting and conferring with ^ Art
14 Handler for a while now.

15 So it has not materialized into a dispute to take up
16 to you, but we're happy to tee it up for you and give you a
17 briefing, a very short letter brief on it, and let you see
18 the documents if you'd like to review them *in camera*.

19 We have a second set of, again, a privilege review at
20 the direction of counsel who is in charge of this litigation
21 late last year. That will be added to our privilege log
22 shortly, but that's not something we discussed with the
23 plaintiffs.

24 In my view, both sets of documents are plainly
25 privileged, and we're happy to present our arguments to you

1 on those on why we take that position.

2 SPECIAL MASTER COHEN: Well, so here is what
3 we need to do. As I noted earlier, discovery ruling 14-5 is
4 what I call a bellwether evidentiary ruling, and I believe
5 it was understood to be that by the parties as it was being
6 addressed. And of course there are other bellwether
7 evidentiary rulings that I have made before where the
8 parties agreed, let's give the Special Master a hundred
9 documents, he can rule on whether our invocation of
10 privilege is appropriate, and then we'll apply that analysis
11 to other documents. So that's the way we've been working
12 things, and it's frankly the only way this can work in a
13 piece of litigation this size.

14 Which is a long way of saying the parties need to
15 continue to try and work this out and apply my ruling, and
16 meet and confer. And when they truly get to impasse -- and
17 I'm not saying don't run and say, okay, we're at impasse,
18 and throw it in Cohen's lap -- you all need to try and work
19 this out as much as you can.

20 To the extent that you know that certain documents
21 you're sticking with it, then I need to see them so that I
22 can do a privilege review.

23 What we need to do though is get some deadlines put on
24 this. And so what I'm ordering is, first of all, for every
25 defendant, and some of them have already done so, is every

1 defendant needs to respond with a statement to plaintiffs of
2 whether they are withholding any audit reports, and if they
3 have, whether they put them on privilege logs.

4 Some defendants have already said we haven't. Unless
5 there's a reason for plaintiffs to question that, then that
6 ends that issue. If plaintiffs do have to question that,
7 you need to meet and confer and try and come to some
8 resolution.

9 But every defendant needs to send a response on the
10 question of "Are you withholding any SOMS audit reports" to
11 the plaintiffs by -- I'll ask defendants, what's reasonable?
12 It needs to be fairly soon. I'll pick it if you don't say
13 it.

14 MR. REED: Special Master, the only reason I'm
15 sitting here silently is I think we've already done that,
16 that we've exchanged correspondence with Pearl Robertson.
17 We're not at an impasse. I don't know that there's more --

18 SPECIAL MASTER COHEN: Is a week fair?

19 MS. STRONG: Can I say one other thing? The
20 folks on the phone are on mute, that's why people didn't
21 speak up on the last issue. I didn't know.

22 SPECIAL MASTER COHEN: I didn't know folks
23 were on the phone, and I'm sorry.

24 MR. WEINBERG: So I believe it was about two
25 weeks ago, it could have been a week ago, after your ruling

1 was affirmed by Judge Polster I sent an e-mail to all the
2 defendants indicating that in light of the ruling we were
3 again asking for the audit reports, and that it was our
4 position that they couldn't just stand on whatever it is
5 they had stated in a privilege log, or whatever their prior
6 correspondence may have been to us, that justified not
7 producing the documents; that they needed to go back, with
8 all due respect, and reanalyze their privilege arguments in
9 light of the ruling; and to the extent that they stood on
10 those privileged claims that they needed to explain to us
11 how it was that those privilege claims still existed despite
12 the ruling under DR 14-5.

13 And so with respect to Mr. Reed, the fact that there
14 has been prior correspondence prior to the ruling, from our
15 perspective, is not enough. And in accordance with what
16 you've just said, because you have provided guidance on this
17 very important issue, from the plaintiffs' perspective we
18 want to make sure that the defendants have analyzed those
19 documents and the context within which those documents have
20 been produced or created, and reassess whether or not those
21 privileges still apply.

22 MR. REED: David, just to shortcut this, I'm
23 happy to send an e-mail saying we have done in fact what
24 Mr. Weinberger asks.

25 SPECIAL MASTER COHEN: Well, my question

1 remains, you know, plaintiffs sent out that request: Some
2 defendants responded, some did not. And I need to set a
3 deadline for a response from every defendant.

4 It seems like to the extent that many defendants
5 already did that, that doesn't need to be a lot longer.

6 So I'm just pulling up my calendar --

7 MR. WEINBERG: We would ask by close of
8 business on Friday.

9 MR. LYNCH: Special Master Cohen, we ask until
10 the 29th, and we got agreement on that from --

11 SPECIAL MASTER COHEN: That's fine. You have
12 until the 29th, the close of business on the 29th. I need
13 every defendant to respond in as much detail as they can to
14 plaintiffs' request that a status report essentially be
15 provided with regard to SOMS audit reports.

16 And with regard to those SOMS audit reports, that any
17 defendant already knows that they're not going to be
18 producing, A, you can put it in a privilege log; B, submit
19 it to me within the next three or four days. And if they
20 want to provide context and explanation I'm happy to receive
21 that, and it can even follow it. It doesn't have to come at
22 the same time as the audit reports themselves.

23 Let me add something --

24 MR. REED: I apologize, but I missed that.
25 What is it that you're looking for from us in the next three

1 or four days?

2 SPECIAL MASTER COHEN: If you already know
3 that you're withholding a SOMS audit report because you are
4 saying it's privileged, I need to receive it for *in camera*
5 review within the next three or four days. And you're also
6 welcome to send a letter explaining, giving it context,
7 telling me why it's privileged; and that letter doesn't have
8 to come at the same time. If you need three or four extra
9 days to supply the letter giving me context, you can do
10 that.

11 MR. REED: So if I could ask for modification,
12 I think your point, that you really don't want to be swamped
13 with material until there's an impasse. I don't think we've
14 reached an impasse, and so I'm not sure it makes sense to
15 submit that to you before there's an impasse.

16 SPECIAL MASTER COHEN: No, no; but for
17 example, McKesson has already said we've already put these
18 on a privilege log, we know we're not going to produce them,
19 so those I need to receive.

20 If you're still working on meeting and conferring, I
21 agree, that should continue.

22 MR. REED: Okay, so we will meet and confer.

23 SPECIAL MASTER COHEN: You absolutely should
24 exhaust all possibility to not reach impasse.

25 MR. REED: Perfect. Thank you.

1 MR. HYNES: Paul Hynes for CVS.

2 Is it three to four days after we reach an impasse
3 they need to be submitted to you for *in camera* review?

4 MR. WEINBERG: This is the problem, Special
5 Master Cohen. You know, these reports are extremely
6 relevant to our SOMS expert opinions.

7 SPECIAL MASTER COHEN: I agree.

8 MR. WEINBERG: So every day that we put off --
9 to use a phrase that the defense used earlier, which was
10 it's simply nonsensical, you know, they know what they have;
11 they have had a chance to look at the opinion. I don't know
12 why it's taking all this time.

13 And frankly, I mean, I will certainly meet and confer
14 with whoever wants to, but it's a simple question. It's a
15 simple answer to some simple questions.

16 THE COURT: Y'all have until May 3 to finish
17 your meets and confers on this. Anything that you haven't
18 resolved, I receive the SOMS audit reports that you can't
19 agree on, and I need to receive contextual letters with
20 those on the 3rd by the latest. Everything before then that
21 you can resolve, I urge you to do so.

22 MR. WEINBERG: Well, are you changing your
23 ruling with respect to the deadline of April 29th?

24 SPECIAL MASTER COHEN: I forgot what that was
25 already.

1 MR. WEINBERG: It was that every defendant
2 must respond to the request --

3 THE COURT: No, they still have to respond by
4 May 29th.

5 MR. WEINBERG: April 29th.

6 SPECIAL MASTER COHEN: Yes.

7 MR. WEINBERG: And tell us whether or not it's
8 on a privilege log.

9 SPECIAL MASTER COHEN: Correct. And then that
10 will give you an opportunity, plaintiffs an opportunity to
11 meet with the defendants, and see if you can resolve any of
12 what is listed.

13 MR. SHKOLNIK: Your Honor, I'm not arguing at
14 this point, but can it be made clear that they tell us which
15 log and exactly where, give us direction?

16 SPECIAL MASTER COHEN: That's a good idea.

17 MR. SHKOLNIK: They get a little milky.

18 SPECIAL MASTER COHEN: Yes, that is a
19 requirement.

20 Is anybody from Cardinal here or on the phone?

21 MS. WADHWANI: Yes.

22 SPECIAL MASTER COHEN: Hi.

23 MS. WADHWANI: Hi.

24 SPECIAL MASTER COHEN: I know that Cardinal is
25 assessing discovery ruling 14-5, and more particularly the

1 Judge's affirmance or decision not to overrule the objection
2 to that.

3 MS. WADHWANI: Correct.

4 SPECIAL MASTER COHEN: But there needs to be a
5 time limit within which Cardinal decides to do something,
6 and I think that it has three choices, from what I can tell
7 from the case law.

8 It has the choice to produce the document; it has the
9 choice to put itself into contempt, and thereby take an
10 appeal; and I think -- although this part I'm not sure
11 about -- it has the choice to seek a writ of mandamus.

12 Right now there really isn't the contempt choice,
13 because there's no order that puts you into contempt. I'm
14 going to make this ripe. In other words, I'm giving
15 Cardinal a deadline.

16 The order that the Judge entered affirming my
17 discovery ruling 14, part 5, came out on --

18 MS. WADHWANI: April 16th.

19 SPECIAL MASTER COHEN: -- April 16th, so by
20 April 30th I need Cardinal to make a choice.

21 If it doesn't produce or file a petition by April
22 30th, then Cardinal will be in contempt. And the contempt
23 penalty is something I have to decide, and I'll issue
24 something in writing.

25 I believe that -- I think my appointment order only

1 empowers me to recommend contempt and not to actually place
2 you in contempt, but you actually need the contempt to take
3 the appeal, if that's what you want to do.

4 I can tell you that it's going to go something like
5 this. What I'm going to recommend is that if Cardinal
6 doesn't produce by April 30th that it will be in contempt,
7 and either affirmative defenses will not be -- may not be
8 invoked, or there will be a jury instruction telling the
9 jury that it has to accept, or that there's a rebuttable
10 presumption that Cardinal was out of compliance; something
11 like that. It's going to be -- it's not going to be a money
12 sanction. Okay?

13 And I just want you to know that that's -- I'm sure
14 the board of directors is trying to figure out what to do,
15 and that's their deadline for doing it.

16 MS. WADHWANI: Okay. So by April 30th we'll
17 alert you, Special Master Cohen, as to Cardinal Health's
18 decision about next steps.

19 SPECIAL MASTER COHEN: Or earlier.

20 MS. WADHWANI: Okay. Thank you.

21 SPECIAL MASTER COHEN: Yep. And you can even
22 tell me, go ahead and place us in contempt, that's what we
23 want to do because we want to take the appeal. The Supreme
24 Court suggests that a defendant can decide to do that in
25 order to take an appeal. If you want to do that, let me

1 know.

2 MS. WADHWANI: Thank you, Special Master.

3 We'll let you know our decision on April 30th.

4 SPECIAL MASTER COHEN: Okay. Thank you.

5 MS. STRONG: Mr. Cohen, Sabrina Strong again.

6 Just going back to issue number 188, I did confirm
7 that we did not have an opportunity to respond. This issue
8 came up on Monday. I believe only Endo responded as to two
9 of the subpoena recipients. There were 20-plus subpoenas
10 served, I believe.

11 As I noted before, I believe each subpoena should be
12 looked at separately to determine whether you think
13 discovery should be permitted in April, given the January
14 discovery cutoff.

15 We would ask that we have an opportunity to respond as
16 to the subpoenas that relate to our clients so that you can
17 properly consider the specific facts relevant to whether
18 it's appropriate to have the subpoenas issued this far after
19 the discovery cutoff.

20 And I would also ask if you were not inclined to
21 change your decision on that that we reserve our right to
22 preclude this evidence from ever being produced at this
23 trial.

24 MR. ACKERMAN: Special Master Cohen, David
25 Ackerman. If I may respond.

1 With respect to IntegriChain especially, we took a
2 30(b)(6) deposition of Janssen on November 15th, I believe
3 it was, specifically related to the data sources available
4 to Janssen.

5 Janssen's 30(b)(6) designee came prepared with a
6 document that was marked as Exhibit 3 to that deposition
7 listing all of the data sources. IntegriChain wasn't on
8 there.

9 That's the problem that we had with IntegriChain, is
10 that say what you want about when Miss Strong claims
11 documents were produced; their own 30(b)(6) designee who was
12 supposed to testify about this didn't, couldn't identify
13 IntegriChain.

14 SPECIAL MASTER COHEN: You're getting into the
15 details, but I want to go back to your -- the pages for
16 your -- let me just jump to it.

17 I'm looking at page 2712 of the agenda. There's a
18 chart here, and the third column lists reason for service at
19 this time -- hold on one second -- and I think this was
20 produced by plaintiffs. Am I right, this chart?

21 MR. ACKERMAN: Yes. I don't have the entire
22 agenda document in front of me, but I think that's the chart
23 we prepared.

24 SPECIAL MASTER COHEN: And in it though are
25 statements about -- I'm trying to remember what I was

1 looking at, because there was something that essentially set
2 forth in many instances defendants' position, including
3 column 3 here.

4 MS. STRONG: Your Honor -- I mean Mr. Cohen,
5 what might make most sense is to have this kicked to next
6 week so we can actually put positions in on it.

7 Mr. Ackerman was getting into some of the details
8 about the specifics of IntegriChain. I would just like the
9 opportunity to brief that for you or put something down in
10 writing so you can understand what the issues are and hear
11 our position on the issues, which I don't believe you've
12 been exposed to.

13 I wasn't -- like I said, I believe other folks on the
14 phone were intending to speak to some of these issues. I
15 don't know that we need to make -- the bottom line is I
16 don't think you've been properly briefed, we're talking
17 about discovery months after the cut-off that I think would
18 only be appropriate if the facts warranted it, and you don't
19 have the facts, from what I understand.

20 THE COURT: Here is another way to do it,
21 Sabrina.

22 So as I said way back when, back in January, whatever
23 you get they get. You took five, they get five. Another
24 alternative is to say choose whatever five you want. You
25 get five, they get five.

1 Instead I chose which five, because those are the ones
2 that actually I think for various reasons are either the
3 most relevant or aren't ones that really, really, really
4 should have been done earlier, which some of them should
5 have.

6 I agree with defendants' position, some of these just
7 came too late, but it's always been a matter of
8 reciprocity.

9 MS. STRONG: I don't know the specific
10 agreement you're referring to, but I would think any
11 discovery authorized in April would have to have some
12 justification for it, as opposed to just a free for all
13 picking up and deciding what willy-nilly discovery you'd
14 want to do at this point in time.

15 With respect to the depositions, for example, I'm
16 doing this off the fly based on what he just said, my
17 understanding is that this relationship didn't even start
18 until December of 2018.

19 So we need to get into the facts, Special Master
20 Cohen, to understand whether it's appropriate or not. I
21 didn't think you were trying to arbitrarily allow discovery
22 after this far after the cut-off.

23 SPECIAL MASTER COHEN: You can object. I am
24 not changing my ruling.

25 MS. STRONG: Okay, understood.

1 MR. FARRELL: Special Master Cohen, Paul
2 Farrell.

3 Knowing that we are short on time, I'd like to raise
4 what I think to be is an extremely critical issue that is
5 the subject of my April 19th, 2019 e-mail to you that I
6 copied all of defense counsel.

7 There's a primary underlying issue that has tentacles
8 that reach out into three or four different subject matters.
9 And the primary issue is that some of the defendants are
10 still limiting Rule 34 and requests for production of
11 documents to the designation of custodial files.

12 As recently as January 25, 2019, you stated on the
13 record that the designation of a custodial file does not
14 limit the scope of Rule 34. Yet very recently, we are still
15 seeing that as a defense, and I'll give you two examples.

16 Number one is that, as you know, I have been trying to
17 affirm whether or not certain distributors ratified or
18 approved the filing of an *amicus* brief in Masters
19 Pharmaceutical. Very recently we subpoenaed HDA, the Court
20 affirmed it, and HDA in fact produced such communications.

21 There is an e-mail from HDA to a whole wide litany of
22 defendants. That document has not shown up in a number of
23 their files, and when asked why it was this document was not
24 in their files or on a privilege log, the response was that
25 custodial file wasn't requested.

1 Number two is discovery request number 8 on my
2 combined discovery request that we served on July 1st,
3 specifically asked the distributors, Please produce and
4 identify the Bates stamp range for all communications to
5 and/or from the DEA since January 1, 2006 related to opioids
6 and/or opioid products.

7 We recently played go fish, where we said to a
8 particular distributor, we're looking for a certain time
9 frame of communications which should exist. And since it's
10 not in your file, we're asking you to go look at your
11 lawyer's correspondence file with the DEA; and the response
12 was, we don't have an obligation to go and look at those
13 custodial files.

14 So those are two primary examples of active litigation
15 points that will be very relevant to the trial, documents
16 that are relevant, they are nonprivileged, and they appeared
17 to have escaped the net of Rule 34, and not been placed on a
18 privilege log only because of some argument that we didn't
19 play go fish with the right custodial file.

20 So what we are asking you to do is we are asking you
21 to definitively state on the record that Rule 34 applies and
22 is not supplanted by or replaced by the designation of
23 custodial files, and that when we the plaintiffs
24 specifically request some supplementation based upon that
25 that they must do so.

1 SPECIAL MASTER COHEN: Well, this is a bit of
2 a Pandora's box, because the parties undertook a long
3 negotiation, and there was a pretty good fight during that
4 time as to who the custodians would be, and it went back and
5 forth, and I had to resolve those to some extent, and then
6 what the search terms would be.

7 And to come back now and say that net didn't work, we
8 didn't get everything -- no surprise, it never will -- and
9 therefore the defendants have to go back, and as to every
10 discovery request we made search everybody, and forget about
11 all of those negotiations we did with custodians, I can't
12 throw it open that wide.

13 On the other hand, if there's a basis like the one you
14 just said or the two of you just said, where it appears that
15 there's something that is clearly important and relevant,
16 then I don't think it's unfair for either party, whether
17 it's plaintiffs or defendants, to ask the other side to go
18 back and look for documents that that net didn't catch.

19 And when I said what I said about Rule 34 before, that
20 was in the context of that specific evidence. So I'm just
21 kind of thinking out loud.

22 I think you're right, Paul, that Rule 34 isn't
23 limited, but I also think -- and I know defendants have said
24 it in some letters -- that you can't just ignore all of the
25 restrictions that everybody agreed to on who the custodians

1 are.

2 I'm not sure where that leads us except that to some
3 extent it may be that you need to send -- well, put it this
4 way: Here is where it leaves us. You're right, defendants
5 can't say we only agree to these custodians, and we're not
6 going to look for documents. If you give them a specific
7 reason to look for a document, which I think you did in at
8 least one case, they can say that as a general rule we're
9 not going to take every discovery response and go and look
10 for everything everywhere, we fairly limited it to
11 custodians. And it works the same with plaintiffs.

12 That's the general direction I can give right now.

13 MR. PADGETT: Special Master Cohen, Bill
14 Padgett on behalf of H.D. Smith, one of the minor
15 distributors.

16 We were on the initial e-mail trail that Mr. Farrell
17 included in the e-mail to you in which we responded that our
18 CEO, who is the only H.D. Smith person copied on that
19 communication, was not included as our custodians because it
20 was an apex custodian request and an apex deposition, and
21 you recall going through all of that.

22 We viewed the custodian list that we had as covering
23 H.D. Smith's HDA communications. We've produced a wealth of
24 HDA communications and documents, and that particular
25 document was -- and I think if I recall some of our

1 discovery conferences -- you noting that there will be one
2 or two documents that don't come through because of the way
3 we negotiated this custodian setup.

4 But what happened there was that they did request
5 this -- our CEO's Dale Smith, Junior's custodial file, and
6 we objected. And this was all part of the apex deposition
7 project at issue.

8 And we specifically asked them, please provide which
9 areas are not covered with regard to depositions and
10 documents, what areas are not covered by our custodian list,
11 and we never got a response to that e-mail.

12 And so I think I'm not going through this as just to
13 our specific situation, but to broadly these are the types
14 of circumstances that you have with regard to this custodian
15 situation, and your ruling did not require us to produce Mr.
16 Smith, his custodial file or his deposition.

17 So I just wanted to lay out how that happened, and it
18 I think highlights exactly what you were talking about with
19 regard to the negotiations, what we worked through.

20 SPECIAL MASTER COHEN: Yeah. And there will
21 never be an endpoint to discovery that is relevant in this
22 case. There will never be an endpoint to documents that
23 either side wants from the other except for deadlines and
24 except for these agreements.

25 And having said that, if there is a specific piece of

1 extremely important evidence that got missed and the other
2 side says, hey, we think you have this, will you look for
3 it, I think that probably that should happen; but it should
4 only happen when it is kind of an important,
5 extremely-relevant piece of evidence that was missed.

6 We've got to live with the 80/20 rule in this case,
7 it's the best we will ever do, and I'm talking everybody.

8 MR. FARRELL: Special Master Cohen, I'd like
9 to note that H.D. Smith at least responded to my e-mail and
10 made that explanation, Cardinal Health has not.

11 So Cardinal Health was also on that e-mail chain, and
12 there's no explanation for how the document wasn't produced,
13 when it was not only asked for in discovery, but David, I
14 asked this question in 30(b)(6), in the testimony itself.

15 More importantly, we know that Cardinal Health engaged
16 in direct communications with the DEA, and in some of those
17 communications we used those communications as the basis for
18 DR 14-5.

19 We've asked for the similar correspondence related to
20 the 2012 DEA investigation, and Cardinal Health says that's
21 with our lawyers, we don't have to produce that.

22 MS. WADHWANI: Special Master Cohen, this is
23 Nela Wadhwani on behalf of Cardinal Health. May I please
24 respond to all these points?

25 THE COURT: Sure.

1 MS. WADHWANI: As to Mr. Farrell's e-mail,
2 Mr. Fuller and I met this morning to discuss the HDA
3 document. So while we did not respond to Mr. Farrell's
4 e-mail directly, I have had communications with plaintiffs'
5 counsel on the HDA document.

6 As to the DEA communications, that is actually agenda
7 item number 199 on the agenda today, so we can jump into
8 that.

9 The springboard for plaintiffs raising this issue was
10 a document that is not a Cardinal Health document, that was
11 produced by Cardinal Health by the end of October in this
12 year. On that, plaintiffs suggest by production of this
13 document that has nothing to do with Cardinal Health that
14 somehow Cardinal Health has an obligation to go out to
15 outside counsel and get additional communications.

16 The letter that plaintiff cited proves no such thing.
17 It's unsurprising -- excuse me, my voice seems to be going
18 away -- it's unsurprising that Cardinal Health is not copied
19 on this letter by the outside law firm K&L Gates to the DEA,
20 because K&L Gates was representing as they made very clear
21 in the first paragraph of that letter Bates Pharmaceutical
22 Services and Bates Pharmacy in the state of Washington, and
23 it was sent to DEA on behalf of Bates. There would be no
24 reason for K&L Gates to copy Cardinal Health on that letter,
25 it had nothing to do with them.

1 Instead, as the prior e-mail to that letter
2 demonstrates, which is in plaintiffs' possession but was not
3 provided to you, was that the way that Cardinal Health came
4 into possession of that document was because the CEO of
5 Bates, who did possess the letter, sent it to employees at
6 Cardinal Health.

7 In other words, this letter which is not about
8 Cardinal Health, proves nothing related to Cardinal Health,
9 and its productions of DEA communications.

10 And the reason this is important is because what
11 plaintiffs are asking us to do is to go on a fishing
12 expedition long of at the end of discovery, based on a
13 document that has nothing to do with Cardinal Health and
14 eviscerates the parties' agreed-to negotiations, and would
15 result, as you said, in the end -- or in no end to
16 discovery.

17 We see this as an attempting to go back to square one
18 on discovery. As Mr. Farrell just said, he thinks that
19 custodians and search terms being negotiated among parties
20 with large volumes of ESI, which is typically the approach,
21 somehow is not meeting the obligations requirements of Rule
22 34. To the contrary, it's been long recognized that this
23 approach to discovery meets a party's obligations, and it's
24 frankly the only feasible approach --

25 SPECIAL MASTER COHEN: Let me jump in.

1 MS. WADHWANI: -- principles knowing it is not
2 reasonable or feasible for the parties to search --

3 SPECIAL MASTER COHEN: Let me jump in. You've
4 jumped to agenda item 199, and I agree with you. I am not
5 going to order anything additional be done with regard to
6 199. Plaintiffs have the document that they have. This is
7 not what I would consider anything like a smoking gun
8 document. And I think I've tried to lay out what the
9 general rules are, which is that I don't need to resay it, I
10 don't need to repeat myself.

11 As to agenda item 199, I'm not ordering anything
12 additional to be done. If different circumstances arise
13 with regard to different types of documents where it's shown
14 that something that's kind of critical that's within the
15 heartland of what needs to be produced wasn't, and that
16 there should be return to looking for documents by a
17 defendant, then the defendant should do that, or I will be
18 asked to order it, and I'll order it. I'm not going to do
19 anything with 199. And we need to move on to something
20 else.

21 MR. ACKERMAN: David, can I ask one thing?

22 The purpose of this is for us to ask for Cardinal
23 Health to turn over direct communications by their counsel
24 with the DEA related to the 2012 DEA immediate suspension
25 order and settlement agreement that resulted in \$44 million,

1 not some collateral proceeding. But when the DEA went and
2 charged them for the second time there were communications
3 back and forth between Cardinal and the DEA, and that's what
4 I'm looking for.

5 SPECIAL MASTER COHEN: Well, if that's what
6 you're looking for, Paul, you're coming at this obliquely,
7 because the document that was shown to me from K&L Gates had
8 nothing to do with Cardinal, it had something to do with
9 some other defendant.

10 If what you're saying is that you think Cardinal is
11 obligated to go ask its outside counsel for documents that
12 it used as communications with DEA in connection with that,
13 then that's what you should ask them. I didn't get that
14 from agenda item number 199.

15 MR. FULLER: Special Master, Mike Fuller on
16 behalf of plaintiffs, the one dealing with Cardinal on this
17 issue. We've been asking them since March, would you just
18 agree to go check with your outside counsel that handled
19 that 2012 investigation and let us know if you have
20 anything, before we have to fight about it.

21 Until this morning they had not given an answer as to
22 whether they would even go and check.

23 Your Honor knows because the communications directly
24 with the DEA related to the 2007 action were very integral
25 in getting 14.5 discovery ruling.

1 We're asking for the same thing, because the
2 communications aren't there. As directly from Cardinal, we
3 suspect they were going through local counsel or their
4 retained counsel at that point acting as their agent.

5 This was just an exemplar of the type of
6 communications that go from retained counsel directly to the
7 DEA.

8 SPECIAL MASTER COHEN: Right. And as I see
9 it, you came at it too obliquely.

10 MR. FULLER: I apologize for that.

11 SPECIAL MASTER COHEN: And it also sounds like
12 you're meeting and conferring as recently as this morning,
13 so I'm going to let that --

14 MR. FULLER: But again, we've been asking for
15 them to give us an answer on this issue since mid March.
16 We're at the end of April now, and they won't. The problem
17 is we continue to meet and confer on multiple issues.

18 SPECIAL MASTER COHEN: Where is Cardinal on
19 the question of whether they will go back to outside counsel
20 and ask for communications that they had with the DEA?

21 MS. WADHWANI: Special Master Cohen,
22 plaintiffs have not demonstrated that we haven't produced
23 such documents that they are looking for, or even that such
24 documents exist. We think they need to do something more
25 than cite a document from another law firm about a client

1 that is not Cardinal Health and suddenly say we have to call
2 up outside counsel and ask them to go search through all
3 their files for documents they may or may not have that may
4 or may not exist, that may already be what Cardinal has
5 produced.

6 SPECIAL MASTER COHEN: There is a 99 percent
7 chance those documents exist, and I'm ordering you to go to
8 outside counsel and find out if they have them, and produce
9 them, unless they are privileged.

10 MS. WADHWANI: Okay.

11 SPECIAL MASTER COHEN: We are moving on to
12 agenda item number 198. We've actually addressed that, and
13 that had to do with SOM expert reports.

14 You know, agenda item 197, which has to do with
15 AmerisourceBergen, it seems like a lot of this could be
16 avoided if AmerisourceBergen had actually responded instead
17 of ignoring us for two weeks.

18 There are three issues here: AmerisourceBergen says
19 that it is gathering these documents and will soon produce
20 them. That has to do with issue one, which is documents
21 concerning DEA enforcement actions related to regulatory
22 compliance at non-Track One distribution centers.
23 Essentially for all of these what we need is a date certain.

24 Well, I should say for issue one and two we need a
25 date certain. I'm happy that AmerisourceBergen asserts that

1 it's gathering those documents and will produce them soon,
2 but I need a deadline.

3 MS. McCLURE: So Your Honor, just for
4 background, this is the issue where we had previously
5 produced information about the Lockbourne distribution
6 center, and you had ordered that we collect from 25
7 additional distribution centers nationwide.

8 In briefing on that we had explained that that was
9 going to require a time-intensive and resource-intensive
10 effort to go to collect both documents that various
11 corporate individuals may have, as well as going
12 specifically out to distribution centers.

13 We are in the process and have been collecting
14 documents from those distribution centers. We are beginning
15 to roll productions out this week.

16 As far as the fact that each of these distribution
17 centers has different managers in charge of it, I would
18 request that we have two weeks from today to complete.

19 SPECIAL MASTER COHEN: That's fine. You'll
20 roll them out in the meantime.

21 MS. McCLURE: We are rolling productions out
22 this week on issue number one.

23 SPECIAL MASTER COHEN: The same with issue
24 two, this has to do with SOM audits. AmerisourceBergen
25 says, quote, We intend to de-designate the annual order of

1 monitoring program audits performed by outside consultants,
2 as well as the internal audits conducted by Amerisource's
3 corporate security and regulatory affairs, et cetera. We
4 will produce -- begin production of the SOMS audits this
5 week.

6 Can you roll that out and be finished in two weeks?

7 MS. McCLURE: Yes. And I believe this issue
8 is also somewhat addressed by the other deadlines that you
9 set today. So to the extent that there are any SOMS audits
10 that we believe fall within those other deadlines that you
11 set for 4-29 and 5-3, we will address those in that time
12 period, which is actually sooner than two weeks; but yes.

13 SPECIAL MASTER COHEN: Okay, thank you.

14 And then issue 3, I'll read you what plaintiffs ask me
15 to rule, which seems reasonable. Plaintiffs asked for an
16 order, quote, requiring AmerisourceBergen to produce the
17 entirety of what it received from FTI on a weekly and
18 monthly basis, including all of the Tableaux files and
19 supplemental monthly reports, and customer score cards, as
20 well as the procedures, algorithms, and queries that were
21 applied against Amerisource's transactional data, in order
22 to run Amerisource's national order monitoring program.

23 MS. McCLURE: Okay. So as to the entirety of
24 the documents that we received on a weekly and a monthly
25 basis from FTI, including things like score cards,

1 supplemental reports, we've already produced a number of
2 those documents in various categories: 7 of 24 of the COP
3 documents, 6 of 14 of the score cards, 5 of 13 of the
4 supplemental reports. We are in the process of rolling out
5 additional materials.

6 And to the point that Mark Pifko's letter says, quote,
7 The entirety of what we received from FTI on a weekly and
8 monthly basis; we are already agreeing to do that portion of
9 it.

10 SPECIAL MASTER COHEN: Okay.

11 MS. McCLURE: As to the second point, which is
12 the procedures, algorithms, and queries by FTI, Special
13 Master, this also implicates the order that you gave about
14 half an hour ago indicating that FTI would be ordered to
15 respond to a document subpoena issued by the plaintiffs.

16 SPECIAL MASTER COHEN: Right.

17 MS. McCLURE: We do not possess some of the
18 information that the plaintiffs have requested, and so what
19 I would suggest is that the parties continue to discuss and
20 meet and confer on that piece, which is called in
21 Mr. Pifko's letter procedures, algorithms, and queries by
22 FTI.

23 SPECIAL MASTER COHEN: All right, so I'm going
24 to order all of that. Obviously you can obviously produce
25 what you have, you can't produce that which you do not have.

1 To the extent that you have procedures, algorithms,
2 and queries, you need to produce it. You said you are
3 already producing everything else that was requested, so I'm
4 simply going to order that you do all of what you just said
5 you're doing, and the parties are going to have to work
6 together with FTI to get that which you do not have. Okay?

7 MS. McCLURE: Thank you, Your Honor.

8 SPECIAL MASTER COHEN: Thank you.

9 194 and 195 both have to do with Cardinal, which has
10 to do with IQVIA documents and the Deloitte documents. What
11 I'm seeing is that there is no impasse, that the parties are
12 continuing to work together.

13 MR. FULLER: Your Honor, this is Mike Fuller
14 on behalf of the plaintiffs.

15 We spoke this morning. We're going to kick this to
16 next week, if we can't get it resolved.

17 SPECIAL MASTER COHEN: That's fine. I'm going
18 to urge Cardinal to re-read discovering ruling 15 and do
19 everything it can as soon as it can to fully update its
20 responses to the -- I think there were five status points
21 listed at the end of DR 15.

22 It sounds like you're working on that, but I just
23 point you to that again as a continuing obligation.

24 MR. FULLER: And we talked about DR 15
25 specifically this morning, Judge.

1 SPECIAL MASTER COHEN: Great.

2 MR. FULLER: Your Honor, 196 you kicked to
3 Special Master Yanni.

4 SPECIAL MASTER COHEN: Correct. 199 we
5 already dealt with.

6 MR. FULLER: Yes, Your Honor.

7 THE COURT: 192 has to do with Janssen's
8 charge-back data.

9 This is information that I think plaintiffs should
10 have asked for a long time ago, frankly. Candidly, it looks
11 to me like an expert started looking at stuff and said, hey,
12 I need this charge-back data, after the fact discovery
13 period had closed, and so I'm going to deny.

14 MR. JANUSH: May I just reply? Because I
15 didn't reply in writing to Janssen's position, and I have
16 information that may change the Court's perspective on this.

17 SPECIAL MASTER COHEN: Go ahead.

18 MR. JANUSH: Evan Janush, for the record, on
19 behalf of the plaintiffs.

20 So what Your Honor may not be aware of is you are
21 aware that I sent the e-mail on November 16th requesting
22 within the discovery period Janssen to identify all of their
23 charge-back data by Bates numbers. That is an exhibit to my
24 submission to the Court.

25 I got a response on December 6th. That response

1 included one Excel file that was an omnibus file for Ohio
2 data. It also included references to other data that
3 discussed charge-back generally.

4 What I didn't get a chance to reply to because of the
5 deadline that I adhered to is the fact that in Janssen's
6 response Janssen included two omnibus Excel files from 2017.
7 I didn't explain the significance perhaps as best as I could
8 have in my initial motion because I didn't realize that
9 Janssen was going to take the incredulous position that it
10 was limiting its charge-back production to only
11 Ohio-specific data.

12 Unbeknownst to you as of this moment is the fact that
13 those two Excel files that were produced with the Ohio file
14 were omnibus 2017 national data from UCLA to Boston,
15 Massachusetts.

16 Why is that relevant? It eviscerates, it entirely
17 undercuts Janssen's position that we should have known that
18 it limited its charge-back position to Ohio only.

19 Janssen produced some national data. The national
20 data it produced was woefully irrelevant to the litigation
21 because it contained 2013 production for three months, 2017
22 production that it identified after two years after NUCYNTA
23 had already been divested.

24 Janssen is essentially speaking out of both corners of
25 its mouth before the Court and saying, well, we produced

1 long ago this Ohio file, and we adhered to DR 2. Well, DR
2 2, Your Honor, as you know, contained two specific
3 categories. Category one, discovery for centralized data,
4 and category two, discovery for decentralized data.

5 Janssen admitted in its response that this came from a
6 SAP alpha database that they specifically filtered to
7 produce the Ohio spreadsheet. They filtered a national
8 centralized database to give us Ohio data, while separately
9 citing us to other tidbits of national data.

10 So I did ask for it long ago. How was I to know that
11 their intent was to read DR 2 differently than every other
12 manufacturing defendant?

13 Every other manufacturing defendant produced national
14 charge-back data. This isn't hard for them to do. They
15 have a SAT database. They should be able to dial it up and
16 produce an unfiltered national report.

17 I didn't know until we followed up and got a response
18 with 185 citations that -- and until we followed up after
19 that and responded with our letter motion to the Court --
20 that Janssen would come back and say, DR 2, what you also
21 need to know.

22 Buried within the 185 citations are a number of
23 PowerPoints, Word documents, snippets, all containing
24 references to national or regional data.

25 SPECIAL MASTER COHEN: All right. So a couple

1 things. First of all, I did get almost all of that --

2 MR. JANUSH: Sorry if you didn't.

3 SPECIAL MASTER COHEN: -- from what you
4 already submitted. Second of all, I think you need to look
5 up the word incredulous.

6 Let me ask you, is it true that every defendant, other
7 defendant, produced national charge-back data?

8 MS. STRONG: I don't know the answer to that.
9 I just want to put a caveat here and answer your question.

10 This is an issue that Amy Lucas is really the expert
11 on, and she's on a plane to a deposition right now. I don't
12 think the answer to that, it doesn't change anything.

13 I want to make something clear as to what Mr. Janush
14 is talking about. Some of this national data produced was
15 actually coming from custodial files, which is distinct from
16 the other sources of information and how it's collected, is
17 my understanding.

18 This information was identified for him back in
19 December, the national information he's talking about. If
20 he had any questions about the scope of our production he
21 should have addressed it back then.

22 I think you have clarity on the facts that it was
23 produced in November, reproduced in December, all of the
24 Ohio data, which we believe is more than what is required.

25 We think it's limited to just the counties, Special

1 Master Cohen, but we produced actually all of Ohio, and
2 there was never any issues until just recently.

3 SPECIAL MASTER COHEN: What is it about
4 national charge-back data that is important and you need it
5 for?

6 MR. JANUSH: So having proof that Janssen
7 tracked national charge-back data is relevant to demonstrate
8 that on a Suspicious Order Monitoring level what they could
9 have done to incorporate that data on a national basis to
10 build that data into their program, and know the downstream
11 distribution monitoring. It goes directly to DR 2,
12 distribution monitoring. It is part of DR 2 category 1. It
13 goes directly to diversion in DR 2.

14 I am representing to you that I have spoken with Linda
15 Singer on this. I have confirmed before oral argument,
16 every single manufacturing defendant produced national
17 charge-back data. The fact that I wrote and asked for the
18 total extent of your Bates numbers for charge-back data and
19 got one Ohio-specific file, two 2017 national files two
20 years after NUCYNTA was sold, and a few 2013
21 national -- three months of 2013 national Excel files,
22 underscores that I was not in a position to read Janssen's
23 mind and know until after seeing the response to this motion
24 that they actually intended to carve out their SAP database
25 and produce only Ohio.

1 We didn't know that they even filtered the SAP
2 database until they responded to this motion.

3 SPECIAL MASTER COHEN: Okay. If --

4 MR. SHKOLNIK: Special Master, can I add one
5 point to respond to your question?

6 SPECIAL MASTER COHEN: Sure.

7 MR. SHKOLNIK: Just to respond to your
8 question that you just posed.

9 National charge-back data is very important here
10 because it shows it will help us, and it helps and it shows
11 what the defendants could do in terms of tracking the
12 migration of pills, people buying in different regions of
13 the country; and they end up being our CT-1 counties, and
14 what information they had, what they could have done with
15 it; and seeing who is receiving the pills, who is buying the
16 pills, and where they're going; and they're the backbone of
17 our SOM reports that have been exchanged.

18 SPECIAL MASTER COHEN: Is it true, Sabrina,
19 that, do you know, it sounds like the Ohio-only data was
20 actually culled from a larger dataset.

21 MS. STRONG: No. I'm getting some notes from
22 folks. It looks like, no, what we produced in December was
23 actually identified as an Ohio file. The entirety of that
24 noncustodial source was produced and clearly identified as
25 Ohio charge-back data. So they had total clarity as to what

1 it was that we produced at the time, and this should have
2 been raised back in November, December. There's plenty of
3 meet and confers about it. This was never ever raised
4 before, Special Master Cohen.

5 MR. JANUSH: That's not an answer to your
6 question.

7 Miss Lucas's response, Special Master Cohen, I would
8 direct you to it, expressly states that the Ohio data was
9 culled from the SAP, I believe it's alpha, I don't have it
10 up on my computer right now, from a SAP database that they
11 filtered for Ohio for NUCYNTA and Duragesic from 1990 to the
12 present, and that is how they produced the Ohio data.

13 I don't know anything about custodial files because
14 Miss Lucas's response to the motion addresses how they
15 filtered a national database.

16 MS. STRONG: And again, to the extent it was
17 filtered, it was very clear that only Ohio was produced.
18 And you know, to the extent that there's more details on
19 this, like I said, Amy Lucas is on a plane right now.

20 THE COURT: I need to think about this one, I
21 am not going to rule today. I need to go back and look at
22 it.

23 MS. STRONG: Okay, and she can be prepared to
24 argue next week.

25 SPECIAL MASTER COHEN: She can send me

1 something additional by e-mail if she wants to.

2 MR. JANUSH: I would encourage, if you haven't
3 looked already, I did attach two large 2017 files that
4 provided national data that would appropriately serve to
5 confuse me that their intent was only Ohio specific.

6 MS. STRONG: Again, I think it's pretty clear
7 that's custodial data, which is very different, Special
8 Master Cohen.

9 SPECIAL MASTER COHEN: I think the last new
10 item on the agenda is item number 202.

11 And Donna, you and I had a conversation about this
12 before. This has to do with, since you are with United
13 Health and I think with some others, with regard to claims
14 data, and I'm actually going to change my mind a little bit
15 as to where I had been once before.

16 I've always been very concerned about medical claims
17 data being released because of privacy issues, and I've
18 also, as you know, tried to take an approach where the
19 parties get some but not all data; so they get 500
20 prescriptions, not all prescriptions, and so on.

21 In this case, as defendants actually write in their
22 letter, we've only received 2 percent of the opioid
23 prescriptions written in Track One jurisdictions.

24 It seems to me that's a pretty reasonable portion, and
25 that from that they can draw inferences, and that they don't

1 need the other 98 percent of those opioid prescriptions.
2 There's no reason to think that the 2 percent is
3 substantially not representative. And so I'm not going to
4 do what the defendants asked me to do when they say that
5 they want me to order United Health and others to produce
6 all of the other claims data.

7 On the other hand, the defendants also asked me to
8 order production of preferred drug lists, formulary plans,
9 and/or -- and I'm reading now -- opioid drug utilization
10 reports associated with health plans offered by insurers
11 through residents of the Track One jurisdictions.

12 That I think is appropriate, that I think the United
13 Health and the others should be ordered to do. We probably
14 need a written order to do that. I'm not sure that just
15 saying that on the record is going to get United Health and
16 the others to do what I just said.

17 MS. WELCH: We're happy to submit today a
18 proposed written order on the issue.

19 With respect to the first issue, Special Master Cohen,
20 I would like to note for the record that in prior
21 discussions with the parties about whether some sort of
22 sampling or some smaller portion was sufficient, I think the
23 Special Master at least asked the other side whether or not
24 they would be prepared, for example, to stipulate that the
25 two percent of data that was provided on behalf of the Track

1 One counties' and cities' own employees and families is
2 representative, whether it's a valid sample.

3 I predict we would not have agreement from plaintiffs
4 on that issue. If I'm wrong, I would certainly love to hear
5 that. But absent some sort of stipulation from plaintiffs
6 on that, again, I think this fundamentally limits
7 defendants' and their experts' ability to defend these
8 claims, denying us 98 percent of what is clearly relevant
9 and discoverable information.

10 We know that based on prior orders, we know it's
11 relevant, we know it's discoverable, and multiple protective
12 orders have been entered, including de-identification where
13 appropriate to protect medical claims data.

14 So we would respectfully disagree with the Special
15 Master's ruling on item one.

16 MR. CHEFFO: And David, can I add on that,
17 too, because I think this is relevant to what came up
18 yesterday.

19 We heard yesterday that the plaintiffs were concerned
20 about -- and Judge Polster addressed this about the ARCOS
21 data, like we're going to have one expert basically come in
22 and say here is the platform, and then at trial we're going
23 to say, oh, we can't rely on that; and the plaintiffs,
24 understandably I think, at least wanted to have the
25 situation where they could say, is there agreement on at

1 least not what the data may mean, but at least that it's all
2 going to be somewhat representative or accurate. Right?
3 This is not the exact same situation.

4 But here, and this is something you know from day one,
5 you know, because we have been kind of asking for this and
6 then not been shy about making the point that prescription
7 data, we then got a few, you know, nothing in terms of the
8 breadth we asked for; we got some representative samples,
9 and over time it's gotten cut down, cut down, cut down.
10 There's really, as far as I understand this issue, there's
11 no discussion.

12 If we were to basically without that stipulation, you
13 know, what's going to happen at trial, we are going to say
14 here is two percent. Well, how can we know that this
15 represents anything? What is the point of that? What about
16 the other 98 percent?

17 So no one could really argue, I don't think credibly,
18 that this is not relevant. I mean, let's go back to what
19 this case is about. The damages is for \$7 billion. Right?
20 \$7 billion is what one of their experts is asking for, in
21 addition to the 200 million in actual damages. And one of
22 our core defenses all along, you've heard there's no stone
23 unturned about any Suspicious Order Monitoring or any
24 charge-back data.

25 They need everything, every piece of detail,

1 nationwide. They want to track everything. And when we
2 basically are talking about the prescriptions here in this
3 jurisdiction, there seems to be two percent is enough.

4 And I just would respectfully say that's just
5 fundamentally unfair for us, because this is the kind of
6 information that our experts absolutely have been waiting
7 for for months and months and months to look at, because we
8 just fundamentally don't think that the characterizations
9 and the story about the prescription data is going to be
10 borne out by this.

11 And this is information that's not hypothetical; it's
12 not a model, it's not ethereal. It's the actual information
13 and data.

14 SPECIAL MASTER COHEN: Two questions. Two
15 questions.

16 MR. CHEFFO: Please.

17 SPECIAL MASTER COHEN: The first is, do
18 plaintiffs have any more data than that?

19 In other words, you have the two percent that you've
20 gotten. Do plaintiffs have any other data?

21 MR. CHEFFO: Well, look. This is the yin and
22 the yang, and that's the point. They want to do a model.

23 You said all along, I think the Court has in some
24 regard, I don't know what they have or don't have, but the
25 point is that you have said in written order, the Court has,

1 it doesn't necessarily matter how they want to prove their
2 case.

3 I don't think what we're saying, and I think as kind
4 of Don said, there may be something less than a hundred
5 percent, but two percent of a statistically-significant
6 modeled-out random selection doesn't seem, respectfully, to
7 be the way to go.

8 Again, their whole point is they only want a teeny bit
9 of information, they don't want to look individually. They
10 want to draw models. We get that, we understand that from
11 the beginning.

12 Our whole point has always been that doesn't work.
13 And whether it's under *Daubert* issues -- and in order to
14 validate a model, as you know, Special Master Cohen, you
15 need actual information. So if they have a whole model that
16 says, for example, Purdue is responsible for 15 percent or X
17 percent; if we say, well, that's interesting on your model,
18 but we have right in front of us prescription data, and we
19 know that that's not true --

20 SPECIAL MASTER COHEN: Let me ask my second
21 question. So here is what the letter says from defendants:
22 Defendants and their experts need the prescription-level
23 data about these actual prescriptions and the accompanying
24 diagnosis information that shows why they were written.

25 I don't really care that that data would include the

1 opioid prescription I got when I had a hip replacement.

2 Okay? I don't really care, but I think a lot of people out
3 there would really care that you have data that shows that
4 they got an opioid prescription and the diagnosis they got
5 it for. There's a tremendous amount of private information.

6 I get that we have protective orders, I understand
7 that, but it's still a tremendous amount of private
8 information that is HIPAA protected. It just raises all
9 kinds of concerns in my mind.

10 MR. CHEFFO: And you've been very sensitive
11 about this.

12 THE COURT: And I don't know that redaction is
13 a realistic possibility.

14 MR. CHEFFO: Here is what I would offer. You
15 have had this concern, and we have not jumped up and said,
16 oh, that's whacky. You've been very concerned about
17 individual data.

18 We've told you a few things. One is you know,
19 notwithstanding anything else, but we have clients in this
20 case, right, who are particularly sensitive, right, with
21 adverse event reporting data and information. It is not
22 like an industry that doesn't understand HIPAA, first point.

23 Second point, you know, there are ways then to not
24 throw -- again, respectfully -- the baby out with the bath
25 water. If you want us to propose heightened levels of

1 protection, whether they are, you know, limited access, we
2 already have they're de-identified.

3 We can do things that I think will satisfy you to put
4 it into some extent, at least initially for our experts to
5 look at this in some kind of black box, that you know that
6 it's -- look, the issue is if we get two percent, those two
7 percent are going to have the same information. Right? So
8 the argument --

9 SPECIAL MASTER COHEN: You've already got that
10 two percent.

11 MR. CHEFFO: I understand. But as to the 98
12 percent, the same protections that we will employ, we have
13 no more interest, as I think I have said to you many times,
14 we do not want to embarrass anybody. We do not want to have
15 personal information available. We are not going to do
16 anything to disclose information that is protected from
17 HIPAA.

18 But the point here is that just like they need this
19 incredibly-detailed information, this is really of kind of
20 the one thing that I think we've been asking for from the
21 beginning. This is the most critical, because I don't want
22 to repeat, but the idea that you can have a model and then
23 you actually have the actual data; and you can't look at the
24 actual data, but we can look at the model, that's just not a
25 fair way to do this.

1 THE COURT: So because it's 1:30, let me just
2 ask, do plaintiffs have a dog in this fight, or is this all
3 United Health's fight?

4 MR. ACKERMAN: So that was what I was going to
5 jump in here. This is not plaintiffs' data. We have
6 produced our claims data.

7 I don't know whether counsel for United Health is on
8 the line, I don't know whether he was given notice of this
9 hearing.

10 SPECIAL MASTER COHEN: I don't think so.

11 Here is what I want you to do. I want you to send me
12 a proposed order like you said you would, including both of
13 these, including both the data and the other, but include in
14 it something that will satisfy me about the privacy
15 concerns, because that's where I'm getting hung up. All
16 right?

17 MR. ACKERMAN: I may jump in on the privacy
18 concerns, however, because as you know, the plaintiffs have
19 expressed privacy concerns about the claims data that has
20 already been produced in this litigation. And to the extent
21 that certain claims data would be subject to heightened
22 privacy concerns, I'm sure that our clients would want those
23 same privacy concerns to be applied to the claims data that
24 plaintiffs have already produced.

25 I'm just talking in the abstract, because I need to

1 see what gets produced or what gets proposed, but I just
2 wanted to put that point out there.

3 SPECIAL MASTER COHEN: It may be things that
4 are already in place are sufficient, but I want it included
5 in the order. It may be you can come up with something that
6 will make me happier that you're then willing to apply to
7 what's already been produced, but you can see where I'm
8 getting hung up.

9 MS. WELCH: Understood.

10 MR. CHEFFO: Thank you.

11 SPECIAL MASTER COHEN: All right. I think
12 that actually brings us to the end of all of the new items
13 on the agenda, and secondly, to the time within which we
14 have today. And we're going to be getting back together
15 next Wednesday, actually in 16B instead of 16A, same call-in
16 number.

17 Any very-very-last-minute things before I jump in the
18 car and go to the airport?

19 MS. McCLURE: Special Master Cohen, another
20 item was 189. In light of the fact that there's now going
21 to be a delay between this hearing and that, that is a
22 renewed item about SACWIS data and the fact that there is
23 still redactions going on of case files, but there's no
24 documents that are being rolled out in the meantime, while
25 other redactions have been completed --

1 SPECIAL MASTER COHEN: I don't know how I
2 skipped over that. I had this written down.

3 That needs to be rolling. Whatever the number there
4 was of ten case files or whatever the number is, as the
5 redactions are done that needs to be rolling, and it's not
6 wait until all ten are finished.

7 MS. McCLURE: And our understanding is that
8 some have already been redacted that are being held, and so
9 we would just like the production of anything that's been
10 redacted to begin to go out the door today --

11 SPECIAL MASTER COHEN: Correct.

12 MS. McCLURE: -- because this is affecting
13 defendants' ability to prepare.

14 SPECIAL MASTER COHEN: You just got what you
15 asked for.

16 MR. SHKOLNIK: Just so it is clear, nothing
17 has been completed and not produced. We were going to, when
18 we came up we said we were going to roll them out.

19 (Multiple speakers.)

20 (Court reporter interrupted.)

21 SPECIAL MASTER COHEN: Everything you just
22 said was not on the record because the court reporter said
23 too many people were talking at the same time.

24 We need to stop. I think we understand each other.

25 MS. WADHWANI: One clarification, Special

1 Master Cohen. You said in your reciting of the second part
2 of this hearing that it was set for the 29th, I think,
3 but April 30th, which is Tuesday, and today you said
4 Wednesday. I just want to make sure whether we're meeting
5 Tuesday or Wednesday.

6 SPECIAL MASTER COHEN: Whatever I said in my
7 e-mail. I think it's Tuesday at 9:30, right next door.

8 Thank you.

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12
13 C E R T I F I C A T E

14
15 I certify that the foregoing is a correct transcript
16 from the record of proceedings in the above-entitled matter.

17
18 s/Heidi Blueskye Geizer April 26, 2019

19 Heidi Blueskye Geizer
20 Official Court Reporter

Date